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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1048

EVERSHIELD PRODUCTS, INC.,
Petitioner,

v.

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Florida

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IN THE SUPREME COURT OF THE UNITED STATES

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EVERSHIELD PRODUCTS, INC.
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Petition for a Writ of Certiorari to the Supreme Court of Florida

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Petitioner prays that a writ of certiorari issue to review the decree of the Supreme Court of Florida filed on September 29, 1967, in the above entitled case of Evershield Products, Inc., Appellants, vs. J. A. Sapp and D. C. Sapp, d/b/a Tice Supermarket, Appellees, and the Court's denial of Appellant's Petition for Rehearing entered on October 26, 1967.

OPINIONS BELOW

The opinion of the trial court, The Circuit Court of Lee County, Florida, (L-939) is unreported and is printed in Appendix A hereto, infra, App. 13. The opinion of the District Court of Appeal, Second District of the State of Florida (No. 6833), Printed in Appendix A hereto, infra, App. 15, is unreported. The Supreme

Court of Florida declined to review on appeal and denied Appellant's Petition for Rehearing (App. 39).

JURISDICTION

The decree of the District Court of Appeal, Second District of the State of Florida was entered on February 10, 1967. Notices of Appeal was filed in the Supreme Court of Florida to review the Order, Judgment or Decree of the District Court of Appeals of Florida, Second District. The appeal was dismissed by the Supreme Court of Florida on September 29, 1967, Petition for Rehearing was filed on October 4, 1967, and denied on October 26, 1967.

QUESTION PRESENTED

Whether the Supreme Court of Florida had jurisdiction under the record under that part of the Florida Constitution designated Article V, Section 4, Clause 2, by the District Court of Appeal initially passing directly upon the validity of a state or federal statute or did it construe a controlling provision of either the state or the federal constitution?

CONSTITUTIONAL PROVISION

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The second sentence of Section 1 of the Fourteenth Amendment is set out verbatim below, with the equal protection clause shown in italics.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner herein will be referred to either as Defendant or Appellant, Respondent herein will be referred to as either Plaintiff, or Appellees, and the following symbols will be used:

TR - Transcript of testimony
R - Record of appeal
A - Appellant's Appendix
E - Appellant's Exhibits

Plaintiffs filed a complaint, (A - pp. 1) which alleged the use of defective materials supplied by Defendant to an applicator franchised in Miami, Florida, sold through an agent in Lee County, Florida. Process was issued and served upon the applicator, a Florida corporation, Evershield Liquid Tile of Florida, Inc.; and at the same time, the president of the applicator was served as an officer of the Defendant, Evershield Products, Inc. (A - pp. 4).

This was erroneous, as the applicator had no corporate connection with the manufacturer, Evershield Products, Inc., a Maryland corporation. The summons on the Maryland corporation was improperly issued and defective in its service.

Subsequently, default was entered against Evershield Products, Inc. (A - pp. 5). The case was submitted to a jury which returned a verdict in the amount of $12,500.00 plus costs (A - pp. 5); and the trial court entered judgment on the verdict on December 4, 1964 (A - pp. 5).

Subsequently, the Defendant was advised of the pendency of the proceedings, secured counsel in Florida to

investigate in December; a petition was filed to test the jurisdiction of the court on the defective process on January 13, 1965 (A - pp. 6). Plaintiffs joined issue on the petition (A - pp. 10) and the court, after taking testimony, adjudicated the matter, holding the process was valid on October 4, 1965 (A - pp. 12), which order had been appealed to the District Court of Appeal in the Second District, which affirmed said order.

Defendant appealed the decision of Second District Court of Appeals to the Supreme Court of Florida and Plaintiff's Motion to Dismiss the Appeal was granted. The Defendant's Petition for Rehearing was denied on October 16, 1967.

STATEMENT OF FACTS

The Plaintiffs own and operate a grocery store in Lee County known as Tice Super Market and entered upon a project to remodel their neighborhood grocery store. An architect had drawn plans for the remodeling, and as a part thereof specified a formulated polyester resin to be used in the food service areas as a coating. The contractor on the job purchased supplies containing these specified polyester resins and secured the services of a Florida corporation, Evershield Liquid Tile of Florida, Inc., to perform the coating job. The Defendant sold the resin under the trade name, "Liquid Tile". The manufacturer of the resin was Evershield Products, Inc., a Maryland corporation, the Appellant in this case.

The Plaintiffs alleged that after the completion of the remodeling, an odor emanated from the food service areas which permeated the whole building and necessitated a rebuilding of that portion. The odor came from that part of the building where the resin had been applied over a base of insulation made of polystyrene. It appeared

the resin was not applied to the polystyrene but was applied to a plaster coating separating the polystyrene and the resin. Also alleged was the fact that the materials, especially the resin, were defective.

Process was issued and served upon George Skadding, who appeared on the officer's summons and return as president of both companies. In truth and fact, Skadding was president of the Florida corporation and had no connection with the manufacturer, which was the Maryland corporation. The summons was erroneously issued and erroneously served on the wrong party. Mr. Skadding did not give notice to the Maryland corporation; and in fact he took no action to let the manufacturer know that the case was pending. He turned the process papers, summons and complaint, over to an officer of the Florida company. A default was entered when the time provided by the Rules for answering expired; and the trial judge presented the matter to a jury. The matter was heard uncontested and a verdict rendered with no one appearing for the manufacturer; and the trial court entered judgment on the verdict.

Subsequent to the verdict being entered, the manufacturer became aware and immediately secured counsel in Florida and a petition was filed to test the jurisdiction of the court and the validity on the judgment on failure of the Plaintiffs to comply with the law with regard to service of process upon the manufacturer as a party defendant and the adequate notice provided for by due process, state and Federal.

In defense the original Plaintiffs relied on the trial notice filed by counsel for the Plaintiffs as required by the Florida Rules of Civil Procedure and on a letter sent from an insurance adjuster for the Florida corporation to the Maryland corporation's office. The trial court denied the petition and reinstated the judgment. The

cause was appealed to the second District Court of Appeal, which court affirmed the trial judge.

Defendant appealed the decision of Second District Court of Appeals to the Supreme Court of Florida and Plaintiff's Motion to Dismiss the Appeal was granted. The Defendant's Petition for Rehearing was denied on October 26, 1967.

REASON FOR GRANTING THE WRIT

The decisions of the Florida Courts in this case are directly in conflict with the equal protection requirements set down by this Court in that:

1. The Defendant, Evershield Products, Inc., did not receive notice of the filing of the Complaint and was not served with process.

2. The Court record on appeal shows that the summons was served on the wrong party, which did not bind Evershield Products, Inc., because said Defendant had no notice.

3. The Constitutional rights of the Defendant, Evershield Products, Inc. were violated in that the procedure did not constitute due process of law under Sections 4 and 12 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States, and it further violated the equal protection clause of the Constitution of the United States of America, as amended.

ISSUES

I.

THE COURT ERRED IN THAT THE DEFENDANT, EVERSHIELD PRODUCTS, INC. DID NOT RECEIVE NOTICE OF THE FILING OF THE COMPLAINT AND WAS NOT SERVED WITH PROCESS.

II.

THE COURT ERRED IN THAT THE RECORD ON APPEAL SHOWS THAT THE SUMMONS WAS SERVED ON THE WRONG PARTY, WHICH DID NOT BIND EVERSHIELD PRODUCTS, INC. BECAUSE SAID DEFENDANT HAD NO NOTICE.

III.

THE COURT ERRED IN THAT THE CONSTITUTIONAL RIGHTS OF EVERSHIELD PRODUCTS, INC. WERE VIOLATED IN THAT THE PROCEDURE DID NOT CONSTITUTE DUE PROCESS OF LAW UNDER SECTIONS 4 AND 12 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA AN D THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IT FURTHER VIOLATED THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS AMENDED.

ARGUMENT

ISSUE I.

THE COURT ERRED IN THAT THE DEFENDANT, EVERSHIELD PRODUCTS, INC. DID NOT RECEIVE NOTICE OF THE FILING OF THE COMPLAINT AND WAS NOT SERVED WITH PROCESS.

In this cause the best place to start an examination of the record is the Opinion of Judge Pierce of the District Court of Appeal. (A - Index in Memo Brief on Motion to Dismiss) His Opinion states accurately the state of the record with reference to the facts of the case. Also it discusses the law and all the current cases with reference to the problems involved in the issue in this case. It resolves the issue against the Appellant, especially

on the procedural due process questions which were raised before the court and which the court adjudicated.

This appeal arrives at an interpretation of the so-called "Long Arm" Statutes whereby, if a foreign corporation is doing business in Florida through brokers, jobbers, or distributors, or is engaged in a business venture in Florida, it is amenable to the Florida courts' personal service of process by serving the Secretary of State as an agent of the Florida corporation and/or individual. The Statutes are 47.16, 47.17, 47.171, and 47.30. This appeal arose from an order of the trial judge, sustaining service of process under the Statutes obtained earlier upon the corporation and confirming the verdict and judgment rendered pursuant to such service (A-pp. 15-16). The Appellant is the Maryland corporation and manufactures the polyester resins; and another party, Evershield Liquid Tile of Florida, Inc., a Florida corporation, buys, dispenses, and applies such polyester resin and is known as the "applicator". Plaintiffs Sapp brought suit in Lee County Circuit Court against the two corporations, one the manufacturer and the other the applicator, and alleged defective materials. Separate summonses for each corporation were sent to Fort Lauderdale, where they each were served by the Sheriff of Broward County on one George Skadding, president of the corporations. In other words, Skadding was served separately as president of the Maryland corporation and also of the Florida corporation. Evershield Products made no appearance in the Circuit Court and was defaulted. Thereafter a jury ex parte returned a verdict against both corporations in the amount of $12,500, on which judgment was entered December 4, 1964. Thereafter, on January 13, 1965, Appellant filed petition in the Circuit Court and alleged that Skadding was not, on August 12, 1963, the date he was served in Broward County, either president of Evershield Products

or had any relationship with the company and that the president of the company is and was one Paul Petrlik, that the corporation was never served with process through the Secretary of State's office, it did not do business and had no place of business and no resident agent in the State of Florida, and that it bore no corporate relationship with Evershield Liquid Tile, that they were two separate and distinct corporations. The petition also alleged that Appellant had never received a copy of the complaint in this case nor had any process been delivered to its hands and that therefore it was not a party to these proceedings in law or in fact (A - p. 6, et seq.).

Plaintiffs in the suit filed a reply to the petition, admitting that process was issued and served in the cause on August 12, 1963, but denied the other allegations and alleged as affirmative defense that the Maryland corporation did have notice and that the complaint and summons had been issued. It also alleged that Skadding was served as president of the company, that a copy of the complaint had been sent by letter on or about September 11, 1963, to Paul Petrick, the actual president, and that Evershield Products was at all times advised as to the statuts of the suit, that it had notice of trial on damages on November 20, 1964, and did not take any steps to contest the jurisdiction of the court (A - pp. 7-12). After a full hearing and the taking of adversary testimony on October 4, 1965, the Circuit Judge entered an order denying the petition of Evershield Products and confirming the verdict and judgment against the corporation (A - pp. 13, 14).

The first question relates to the evidential support of the trial judge's findings. (Assignment of Errors No. Four and Five). The Judge found as facts that the Appellant was served with a copy of the complaint and summons by service upon the agent of the Appellant transacting

business for it in the State of Florida; second, that the officers of the Appellant received a copy of the complaint and summons by registered mail; third, that the corporation had forenotice of said suit and an opportunity to defend; fourth, that the corporation chose not to raise the jurisdictional question until after the case had been tried before a jury and a verdict rendered and a judgment entered; fifth, that the Appellant did business in the State of Florida through a broker, jobber, or distributor, namely, Evershield Liquid Tile; sixth, that strong economic ties existed between the Appellant and Evershield Liquid Tile; seventh, that service was obtained pursuant to the laws of the State of Florida and that Appellant's Assignment No. Four shows that there is no evidence to support the judgment of the court. The first finding of fact is that the Defendant was duly served with a copy of the complaint and summons in this cause by service upon an agent of said foreign corporation transacting business for it in Florida. At the time of the process being served, George Skadding was not president of the Appellant, he was not even associated with the Florida corporation, he was not an agent for any corporation transacting business for the Maryland corporation, as the findings of fact show; and there is no evidence to show that he was an agent of the Maryland corporation or ever transacted business for the Maryland corporation in Florida at any time. He was, at one time, an employee of the Florida corporation but not at any time during the progress of these proceedings.

The second finding of fact relates to the officers of Evershield Products receiving a copy of the complaint and summons by registered mail. This is taken from the Statute which requires the Secretary of State to send by registered mail the complaint and summons. Actually, the copies referred to in the finding of fact were evidenced by a letter which an insurance adjuster

for the Florida corporation testified that he mailed to the office of Evershield products. He did not perceive that he was serving papers on the Evershield corporation; and no one at that time would have believed that on the basis of that notice, one could be held bound to a Florida decree or judgment. The officers of the corporation testified to the contrary, that they received a letter, but there was no summons or complaint; but the trial judge believed the adjuster and disbelieved the officers of the corporation. The finding does not say the process was served according to the Statutes or according to law.

The third finding of fact with reference to notice is a conclusion based on, I suppose, this same letter which supposedly created an obligation to defend. The writer submits that this finding of fact is erroneous also in that the letter may have provided knowledge that a suit was pending and that Evershield was a party in the complaint; but no reasonable individual, whether layman, lawyer, or judge, could have been convinced <u>at that time</u> that a letter from an insurance adjuster was legal notice which required one to defend a suit in a foreign state. No one would recognize this form of legal service of process; and for that reason, this notice and knowledge are not the same thing.

The fourth finding of fact with reference to choosing to raise the jurisdictional question is a finding of fact with reference to the intent of the Appellant. I was unable to find anywhere in the testimony of either party that a choice was made by any person, either Plaintiff or Defendant, from the evidence presented to the court. Ordinarily a Defendant in a law suit doesn't have much choice about raising or not raising; if he is in court, he is compelled to defend, and if he is out of court, he is not obligated to defend until he is brought before the court properly.

The next finding of fact and the evidential support relates to a holding that Evershield Products did business through a broker, jobber, or distributor. Actually, this is not exactly in evidence either. The evidence showed that the Florida corporation brought a resinous product and that it entered into contracts to apply this as a coating contractor to buildings, mainly, that the manufacturer did not stand responsible for the completed jobs but only stood responsible for the labeling on the containers as it was delivered to the purchaser. The Florida corporation then mixed the material and applied it to walls, along with other jobs which the contractor performed. Subsequently, the Florida corporation was not a broker, jobber, or distributor whereby it sold a product through inter-state lines and obtained a commission on the sales of the product to an ultimate purchaser, such as in the case of an automobile or a cooking utensil or a hand tool. The value in the product is the service that one obtains, the mixing and applying of the material. That is the ultimate cost. If this construction is adopted by the Supreme Court as a proper application of the Statute and if the finding of fact is sustained, then it would also cover a lawyer in New York who wrote a letter to his client in Florida. If one wished to bring a malpractice suit in Florida, he could sue the New York lawyer through the service which the lawyer rendered in the letter and in that sense he would be a broker or distributor for the law firm that delibered the letter here or talked to a client here for the New York firm. In this same sense, he would be a broker, jobber, or distributor. The intent of the Statute on which the finding of fact is made was to cover a product sold, not a service; and the finding in that sense is not supported by the evidence.

The next finding of fact, that strong economic ties existed between the corporations, relates to the evidence

that the Florida corporation was in financial difficulty and owed a large debt to the Maryland corporation. Perhaps there was a strong economic tie in that the Maryland corporation was trying desperately to collect its funds and avoid a loss.

In the final finding of fact with reference to service being obtained under the laws of the State of Florida, the trial judge just made the broad general finding of fact and the evidence showed that process was served as mentioned hereinbefore. Counsel has been unable to find any Statute authorizing service of process through an insurance adjuster by letter with a copy of the complaint attached, if that was so. To say that the insurance company was the agent doing business in Florida for Evershield Products doesn't really accurately state the situation and to state that Mr. Skadding is president of the Maryland corporation doing business for it in Florida does not accurately state the situation. There is no evidence in the record to show that there was an agent of the Maryland corporation doing business for it in Florida or that there was a corporation acting as agent or as a broker, jobber, or distributor that was served. Perhaps the factual situation would have been different if Evershield Liquid Tile of Florida had been served as resident agent of Evershield Products, Inc.; and in this way, by straining the Statute, one could say that the two corporations were related or doing business with each other or that there was some causal connection between the two. This was the theory used in the Mooney Aircraft Case, 332 F.2d 137, et seq. and which was approved. As an impartial reading of the record shows, the findings of fact do not fit with the evidence introduced before the court; and therefore it is accurate to say that the trial judge's findings and the judgment are not sustained by the evidence in the record and that there is no evidence to support them. Consequently, the District Court of Appeal and the trial judge

were in error in holding that these findings of fact upon which the Opinion is based are supported by the record. (TR - P. 1, et seq.)

The second question which has been raised in both lower courts but which was decided only by the District Court of Appeal directly relates to the question of procedural due process guaranteed by Sections IV and XII of the Declaration of Rights of the Constitution of Florida and by the XIV Amendment, as amended, of the United States Constitution. (Assignment of Errors Numbers Two and Three). At the outset, Appellant wishes to advise the court that no reasonable person has any objection to the "Long Arm" Statutes; and it is true that conditions have changed from Colonial America to jet airplanes and immediate communications to where one in business in a foreign state or dispensing its products over a multi-state area should be called upon the defend its product of a service in an area where a purchaser buys this because the cost of trial and the cost of presenting evidence of a technical nature to a court many miles away often is such a disadvantage to a purchaser that the cost of the product does not warrant his bringing it to court. However, at the same time, a business organization is entitled to legal notice prescribed in the constitution in the term "due process of law" whereby it has an opportunity to defend itself from the unreasonable claims or unfounded claims of purchasers. Our Florida Rules provide 20 days to answer the complaint; and the "Long Arm" Statutes provide in detail how one shall be brought before the court. They specify the officers on whom the papers must be served (and by papers the writer means complaint and summons); and if no person is here bearing that capacity, then one may serve the Secretary of State. From the legislative history mentioned in the Mooney Aircraft Case, it is evident that the Florida legislature expects to take all the constitution

allows in constructive service of process against foreign corporations. In each case decided and statute that has been passed, the legislature has immediately expanded its interpretation of the "Long Arm" Statutes to reach foreign corporations in every way that can be constitutionally acquired. The Mooney Case discusses this particular problem, and no litigant can complain with the intent of the legislature or the construction placed by the court on the acts which have been passed. It is evident, though, from a reading of Statutes 47.16 and 47.17 that a method has been provided by which a standard is established which, if followed, will provide a method that will insure knowledge being passed to a foreign corporation and that it would be received by a person in that corporation who had the authority to act on that knowledge. Further, the "notice" or knowledge constructively given must be in such form as it will be recognized as constructive service by the recipient. How many people receiving a letter from an adjuster, no matter what information the letter contained, would anticipate this could be service of process. Traditionally, there has been a requirement that process be serviced by public officials, sheriff, or the Secretary of State. Consequently, while insurance is not maintained that a foreign corporation will receive the notice, it is a reasonable standard; and, if followed, reasonably accurate notice should be given to any corporation anywhere in the United States doing business in Florida. These Statutes have been held constitutional, state and Federal, with reference to providing a method, procedurally, to bring foreign corporations into court via personal service constructively. However, at the same time, the Statutes are in derogation of the common law; and they are to be strictly construed. This would lead one to believe that if he departed from the Statutes, he would have no process at all, and that a person notified contrary to the terms of the Statutes would not be in

court and would not be bound by the jurisdiction or the judgment issued by the local court.

The District Court of Appeal without doubt modeled its decision on Delray Beach Aviation Corp. vs. Mooney Aircraft, Inc., CCA 5, 1964, 332 F.2d 135, which that court stated was a case identical in principle with the case under adjudication. I would suggest to this court two differences: 1) that in the Mooney Aircraft Case, the Florida corporation was served as the Statute provides as a resident agent of Mooney Aircraft, Inc. This was not so in the present case. 2) In the Mooney Aircraft Case, as was intended by the Florida Statutes, one is dealing with a product, an airplane; and in the case subjudice, one is dealing primarily with a service, not a product; and the Statute does not cover the rendering of personal services. Finally, procedurally, there was a different problem. In the Mooney Case, the case in Florida proceeded to judgment; and when suit was brought in Texas to domesticate the Florida judgment, it was attacked. At that time, the only basis for the attack was procedural due process, while in the instant case, the case was attacked in Florida before the judgment was sent to a foreign state for domestication. Consequently, the scope of the attack is much broader by an attack on the evidence as hereinbefore stated. The Texas court, without a doubt in a very well-reasoned opinion, construing Florida law, held Mooney subject to the Florida courts and required it to pay the judgment. Notice that an airplane is not a service but is a product. Such a case had not been decided directly in Florida; and the District Court of Appeal, by making this decision a part of the Florida law, has a novel or new decision which will be binding probably, if accepted by this court, for many, many years to come. The District Court of Appeal did point out that there was another difference, and that was that Mooney did not deny receiving a notice; and in

the instant case the officers of Evershield did deny having knowledge of the case. The District Court of Appeal's Opinion is careful to use the term "notice" rather than "knowledge" or the term "actual notice"; and legal notice provided for in procedural due process is not the same as knowledge that a suit is proceeding. The District Court of Appeal discussed at length the service of process required by the Statute and the extension of the Statute that the Texas court approved by holding that the term "resident agent" mentioned in the "Long Arm" Statute did not necessarily mean the one filed by the corporation with the Secretary of State but the term "resident agent" could apply to any person who had even an incidental relationship to the foreign corporation. It approved, in violation of the rule of strict construction, an extension of the constructive service statutes by saying that the technical term "resident agent" did not really mean what it said but that it included any corporation or individual who was a broker, jobber, or distributor. There was no claim in the pleadings that the product sold to the Florida corporation was not in accordance with the manufacturer's specifications or labeling. The process in the Mooney Case provided that it was served on Metropolitan through its vice-president, cashier, secretary, treasurer, general manager, or director of Mooney Aircraft; and if one is to extend the Statute further than its terms, then this was the correct way to do it; and the Statute provides that these other people must be served first. In the absence of these people, then any agent of the corporation incidental to or connected with the foreign corporation could be served. By expanding one's imagination, one could say that Metropolitan was incidental or connected with Mooney Aircraft in such a relationship that one would have reason to believe that it would communicate information to the Texas company, as in fact it did. However, under due process, all one requires is a reasonable certainty that a person

will act in accordance with a presupposed standard; and whether the information is delivered or communicated is not guaranteed or suggested to be guaranteed by the method provided by the state government. However, it is an extension of the Statute beyond its expressed term, in violation of the common law rule of strict construction.

Now the case at bar goes one step further on top of this extension, or it is an extension upon an extension, if you please. In the case subjudice the process was served upon a wrong person, not connected with or incidental to the foreign corporation, but who had at one time prior to the instigation of the proceedings been connected with the local corporation, the Florida corporation. At this point one passes the constitutional standards whereby one would expect an individual or a business organization to be reasonably obligated to deliver the information, that is, summons and complaint, to the foreign corporation; and in truth and fact this official did not. The situation probably constitutionally would have been no different if he had; but this individual did not. He "called up" someone who he knew was connected with the Florida corporation and would act to protect the Florida corporation's interest; as any party to a law suit does who has insurance, he promptly turned it over to his insurance agent. As it turned out, the policy which he had did not cover the loss; and the agent responded that they had no coverage and that was the end of the matter except that he did send a letter in accordance with company routine to the other parties to the suit, including the Plaintiffs. Contrary to the Mooney Case, the District Court of Appeal did not suggest that Mr. Skadding was a resident agent in the sense mentioned in the Statutes of the Maryland corporation and did not suggest that he was president of the Maryland corporation. The District Court did not suggest that Mr. Skadding had anything to

do with the law suit of the parties or that he was acting in any situation where one would expect him to turn over the summons and complaint to the Maryland company or that he was obligated to act in any such manner.

Looking at the matter differently, one could see that from the letter knowledge was received by the Maryland corporation that a suit had been filed against it in Florida, and looking at the next bit of evidence, that of the notice of damages required by the Florida Rules of Civil Procedure, knowledge was again indicated to their office. The difficult question is at this point. Is one obligated to come from a foreign state when he receives a copy of the pleadings advising him that the case is proceeding in the foreign state without giving him summons and complaint in a constitutional manner? The only knowledge communicated to the Maryland corporation was the letter and enclosures, if it had any, and also the notice. On this basis the Maryland corporation has been held bound to this judgment. Counsel has been unable to find any case even remotely connected that would present legal authority for this position, except for the law of this case. The District Court of Appeal's Opinion, which is written in such a way as to sustain the findings and omits the most serious problems in the file, does show that from this knowledge Evershield Products had the unrestricted right to come to Florida on these two occasions and contest the suit if it desired to do so; and no one can dispute that. But the real question which demands answer is whether they were obligated to do so; and again counsel is unable to find any case that holds that a trial notice or a letter would obligate one under a "Long Arm" Statute to defend a case in a foreign state. The District Court of Appeal disposes of this problem by saying that the Florida Rules of Civil Procedure allow one to test the court's jurisdiction by motion over the person, over the process, and over the service of process; and the problem

about putting a summons and complaint through the statutory channels on the foreign corporation is omitted. The due process problem is acute when one examines closely the facts. For example, if the summons had been served on Evershield Liquid Tile of Florida, Inc., as agent of Evershield Products, Inc., then you have a case strictly within the procedural standards approved by the case law on due process; because whether or not in actuality an agency situation exists, Evershield Liquid Tile of Florida could be called an agent under the situation at hand for the purpose of serving process if the "Long Arm" Statutes apply to personal services. Notice how the situation changes, though, when you serve the wrong party, when an individual is named as president of a foreign corporation and he is served in that capacity as president. That is, a direct service of process is attempted on the corporation by naming an erroneous person in Florida as an officer mentioned in the Statutes. By adopting this mode of procedure, one could serve anyone doing business in the United States by adopting a false name for the president of the company and having process served on an individual physically present in the State of Florida in a supposedly representative capacity. It is common knowledge that officers do not know most of the persons on whom they serve papers but receive direction from counsel as to whom to serve and the address at which to serve them. Consequently, it is difficult to understand how the protection afforded by the due process clause can be subverted or on the other hand sustained through the erroneous service of process on the wrong person by saying, "Well, perhaps it was erroneous and perhaps the directions were false and perhaps this individual has no connection, but by happenstance knowledge was received; and therefore, once knowledge is received, a foreign corporation is compelled to act." In a sense, all the Constitution requires is that the state provide a standard which a litigant must follow in order

to reasonably insure that notice will be transmitted to the Defendant, providing the facts complained of arose within the State of Florida. As legal authorities, the court's attention is directed to Penoyer vs. Neff, 95 U.S. 714; International Shoe Company vs. Washington, 326 U.S. 310; and Wuchter vs. Pizzuti, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A.L.R. 1230. The Florida standard was announced in Mason vs. Mason Products Co., Florida 1953, 67 So. 762, at page 763. The Florida standard is and has been that the agent must have a legal or moral duty to report and properly handle the summons served upon him as agent of the foreign corporation. (Emphasis supplied). As to the constitutional standards for notice, these were announced by the United States Supreme Court in Cannon Manufacturing Co. vs. Cudahay, 1925, 267 U.S. 333. This case held that where a foreign corporation solicited customers in North Carolina through a wholly owned subsidiary, and suit was instituted against the subsidiary, attempting to bind the parent corporation, the parent corporation was not amenable to suit through the subsidiary, even though wholly owned and completely controlled by the foreign corporation.

The following cases give the legislative history: Davis Berkman vs. Ann Lewis Shops, 246 F.2d 44; Fawcett Publications vs. Rand, 144 So. 2d 512; Deere & Co. vs. Watts, 148 So. 2d 529; International Shoe Company vs. Washington, 326 U.S. 310, 66 S. Ct. 154; Dooley vs. Payne, 326 F. 2d 941, 5th Circuit 1964; Hanson vs. Denckla, 357 U.S. 235; Weber vs. Register, 67 So. 2d 619, 1963, Florida Supreme Court.

In this area there is one other group of cases that requires discussion; and this is that group of cases that holds that substituted process is valid against a foreign corporation not authorized to do business in this state, providing that the cause of action arose in this state or

that the facts of the case are such that a Florida person is involved with a foreign corporation while he is conducting his business affairs wholly in the State of Florida. This is a condition which has been grafted onto the Statute by the courts. It is true, as a matter of fact, in this matter before the court, that the job which was being performed by the Florida corporation took place in Florida and that the dispute which arose among the parties at that time arose out of actions of the Florida corporation, use of materials in a job in Lee County, Florida, which brings it within the conditions announced in these cases. It is distinguishable in one particular fact and that is that in the case at bar one is dealing with a service primarily rather than a product. The District Court of Appeal in its Opinion, on page 18, held that the cause of action arose out of activities of the foreign corporation within this state because of the noxious odors alleged in the complaint. This also stretches the matter quite far, as in truth and fact, the foreign corporation sold materials to another Florida corporation. The second corporation then sold a service and the dispute arose out of the service. There is an intervening step along the way which was not involved in the cases which are cited herein. It is in this particular feature that one is extending the doctrine of substitute service beyond that area where there is direct contract with the purchaser. The Appellant did not sell anything to the persons who brought the claim and in fact had no contact with them. The cases referred to are Zirin vs. Pfizer & Co., Inc., 121 So. 2d 694, 128 So. 2d 594; H. Bell & Associates, Inc. vs. Keasbey & Mattison Co., Fla. Appeals 1962, 140 So. 2d 125; Confederation of Canada Life Insurance Co. vs. Vaga Y Arminan, Fla. Appeal 1962, 144 So. 2d 805. This case is significant in that it held that the corporation would be bound if it only had fair and ample notice of the suit against it; and the Canada Life Insurance Company case cites a Supreme Court case, Perkins vs. Bengue' Consolidated Mining Company, 342

U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485. Based on an analogy to the Canada Life Insurance Company Case, one is led to believe that if a suit were filed in Lee County, for example, against a company whose principal office was in New York, and it were carried on a wire service and one read it in the newspaper, then he would be bound if the newspaper account contained a fair and ample notice of the allegations in the complaint. The facts of case are somewhat different from this analogy; but it points up strongly the constitutional procedural problem as to what kind of a standard the state may impose within the restrictions imposed by the Constitution to provide an adequate method of notice. The late Supreme Court cases of Giannini Controls Corp. vs. Eubanks, Florida 1966, 190 So. 2d 191; and Illinois Central Railroad Company vs. Simari, Florida 1966, 191 So. 2d 427; and the 4th District Court case of Bradbury vs. Savage, Inc., Florida Appeal 1966, 190 So. 2d 183, all hold cases of invalid process on slightly distinguishable grounds; but are important in surveying the whole field encompassed by this problem constitutionally.

In summary, this group of cases seems to say that if a foreign corporation is doing business in Florida and the cause of action sued upon arose out of the activities of that foreign corporation in the State of Florida, it is subjected to the substitute service required by the Statutes and that if the substitute service does not comply with the Statutes, then the cases do not say what results; and, in fact, this is the situation before the court in this case. Notice please that in each of these cases the ruling is bottomed on the fact that there is a direct connection between the foreign corporation and the person in Florida who sues, which is not the case subjudice. One other interesting fact appears from a study of the Florida cases and the United States Supreme Court cases and that is that it is immediately apparent that Florida is using

one standard for due process under its constitution and the United States Supreme Court has announced a differing test and the cases are an effort by the judiciary to "fit the facts" under both of these standards, which are not necessarily the same. The Florida test is shown in Mason vs. Mason Products, infra, and the United States Supreme Court test is shown in the International Shoe Company case, infra. The United States Supreme Court has not yet held that a state must provide a fixed procedure to bind a foreign corporation extra-territorially to the jurisdiction of the form. It is assumed throughout all the opinions, state and Federal, that a state has supplied this method and that the method has been complied with. The writer suggests to the court that the case at bar is the first case among all of these authorities where there is a departure from the statutory procedure.

All of the cases examined by the writer deal with a product except this one which deals with a personal service, a coating contractor.

Also there is an interesting problem in this case which could result in an abuse of the "Long Arm" Statute by the method by which evidentiary matters are settled in the trial court. Notice the evidence in the record whereby the management of the Florida corporation denied receiving notice prior to default. The Appellee presented evidence that notice, its pleadings, complaint, and summons, were sent by oral testimony, based on the business routine of a non-party witness. The court, as it had a right to do, resolved this question of fact against the foreign corporation; and that item is probably foreclosed. Except for insufficient evidence to support its fact, the District Court of Appeal holds that because of the finding of fact by the trial court, the foreign corporation had a right and was bound and required to come and defend. The defense is based on the fact that it did not defend because it did know it. This, then, by using or citing

the Florida Rules of Civil Procedure with reference to jurisdictional defenses, provides a reasonable answer that one should come and test the jurisdiction of the court upon receipt of knowledge. By this procedural method, if one is not believed, he loses his defenses before he can get to court; and if it might be suggested that the trial court could be in error, that is, he believed the wrong witness, then one lost his defense before he got to court because he had no way to present it. At this point, the judgment rests on oral testimony, which is a lot more unreliable than a summons returned by an officer, as almost all judgments rest. Consequently, there is another problem that arises in a situation such as this. If one desired to procure a judgment, it would be easy to present knowledge to a foreign corporation without complying strictly with the Statutes until a default was obtained and then defend the default by writing letters and obtaining service of process through counsel by notice rather than complying with the Statutes and supplying pleadings and summons as most people feel the law requires. The United States Supreme Court standard of constitutionality, providing there are certain minimum contacts with the state and providing the procedure does not offend traditional notions of justice and fair play, is so broad that among the states some more definitive test needs to be devised in order that people will know with certainty when they have the opportunity to go defend or when they have an obligation to defend, which terms are substantially different. Another interesting question develops at this point. Could one impeach the return of an adjuster? Is he liable civilly for erroneous service of process?

It is evident from the judgment entered in the trial court and also in the District Court of Appeal that both courts were over-persuaded by the colorful language and the very well-reasoned opinion in the Mooney

Aircraft Case, infra. The cases presented herein show the development of the law in Florida and this case in the District Court of Appeal engrafts the Mooney decision as the law of Florida. It was a decision by a Circuit Court of Appeal on what the Florida law would be in those circumstances. However, that case distinguishes itself from the one subjudice on the basis that the retailer of the product in Florida, Delray Beach Aviation Corp., was served as a resident agent of the Mooney Aircraft Corp.; and this is the crux of the matter. The District Court of Appeal felt differently, and, in applying it to the present case, came up with the result that as long as, somehow, the foreign corporation received knowledge of the contents of the summons and the contents of the complaint, that the Mooney Aircraft Case was applicable to the case at bar. If that is so, then it is the position of the Appellant that the Statutes are unconstitutional in that they do not provide a standard whereby a corporate citizen of a foreign state will recognize when he is obligated under the Florida "Long Arm" Statutes; that is to say, that "the application of the Florida Statutes, which are mentioned herein, to the particular case at bar, makes them unconstitutional in their application to this case for the following reasons. First, it provides no standard by which a person will know when he is bound by the jurisdiction. Second, it provides inadequate time under this method. Third, it is too vague, uncertain, and indefinite to bind a foreign corporation under the constitutional requirements of the Florida constitution, the Declaration of Rights, and the United States Constitution, XIV Amendment, due process and equal protection clauses." This method provides no fixed time in which to answer the complaint. It is insisted that there is no evidence supporting the judgment in that there is no agent in Florida served in any regard. On this basis, the "Long Arm" Statutes do not apply. There was an attempt at direct personal service which failed; and this

case since then has been a method to correct that error by applying the "Long Arm" Statutes to a situation in which the legislative intent would not apply. The law provides one way for direct personal service and it provides another method for constructive service. The method employed at the origination of this suit was direct personal service; and it has been sustained on a jurisdictional basis because of the constructive service statutes which were not complied with. On this basis, there is no evidence to support the order of the trial court or the opinion of the District Court of Appeal.

ISSUE II.

THE COURT ERRED IN THAT THE RECORD ON APPEAL SHOWS THAT THE SUMMONS WAS SERVED ON THE WRONG PARTY, WHICH DID NOT BIND EVERSHIELD PRODUCTS, INC. BECAUSE SAID DEFENDANT HAD NO NOTICE.

The record on appeal indicates that the complaint which was served on the wrong party was not delivered to Evershield Products, Inc. The president of the appellant testified that he never received the complaint and that the only document received by him was a trial notice which was received during the course of ordinary mail and which he thought was sent to him by error (TR. 6-7). He never heard or knew that the litigation was pending. The manager of Evershield Liquid Tile of Florida, Inc. testified that when he received the complaint, he did not forward it to Evershield Products, Inc. as no one told him it was his duty to do so, and he thought that it would be brought into court by other means (TR. 24, 31). The plaintiffs produced a witness who was an insurance adjustor who testified that he sent a letter to the president of Evershield Products, Inc., and according to his best recollection, he sent a copy of some part of the pleadings with it (TR. 41, 42, 43). He said this was so

because from the letter it showed that there was an enclosure and it was his practice to send pleadings to other parties when they came into his possession. Mr. Petrik testified that if Mr. Tozzie sent the pleadings to him that he never received them. This is all the evidence with reference to notification of the appellant of the pendency of the suit. It is uncontroverted that the summons was served on the wrong party and that the party on which the complaint was served made no effort to notify the appellant. Consequently, the appellant asserts that it is not bound by the proceedings and the court was in error in failing to void the judgment against this defendant and to vacate the judgment as to it. The Florida Rules specifically authorize the procedure by motion to attack a judgment on a jurisdictional basis and a judgment which is void is subject to collatoral attack at any time in any court. A situation like this is subject to great abuse and if the court lends judicial approval to this means of "hailing people into court", one's rights to present his defense and have his day in court are seriously impaired.

ISSUE III.

THE COURT ERRED IN THAT THE CONSTITUTIONAL RIGHTS OF EVERSHIELD PRODUCTS, INC. WERE VIOLATED IN THAT THE PROCEDURE DID NOT CONSTITUTE DUE PROCESS OF LAW UNDER SECTIONS 4 AND 12 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IT FURTHER VIOLATED THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS AMENDED.

The constitutional standards for notice announced by the United States Supreme Court in Cannon Manufacturing

Co. vs. Cudahay, 267 U.S., 333 (1925 Supreme Court) this was a case wherein a foreign corporation solicited customers in North Carolina through a wholly owned subsidiary, and suit was instituted against the subsidiary attempting to bind the foreign corporation. The Supreme Court held that the parent corporation was not amenable to suit through the parent corporation or its organization even though it was wholly owned and completely controlled by the foreign corporation. A Second Circuit Court of Appeal case deals with this same subject. The case is Davis Berkman vs. Ann Lewis Shops, 246 Fed. 2nd., 44. This case occurred in Hillsborough County, Florida, and was brought in the District Court on diversity of citizenship. Ann Lewis Shops, Inc. was a Delaware corporation qualified to do business in New York and maintained its principal office in New York City. The president leased space in Tampa from an assignor and formed a corporation to operate a retail store named Ann Lewis Shops of Tampa, Inc. The subsidiary entered into a lease which was guaranteed by the parent corporation. The president and secretary were common officers in both corporations. All of the stock was owned by the parent corporation. The subsidiary defaulted on the lease and suit was instituted in Hillsborough County under the Long Arm Statutes, 47.16 and 47.30 and a judgment was rendered. Subsequently, suit was instituted in New York on the Florida judgment to collect it and the guarantor attacked the suit on whether the Florida court had jurisdiction. The Second Circuit Court of Appeals held that the court had no jurisdiction as proper service under the Long Arm Statutes would not bind the Delaware corporation with offices in New York City.

Another case in Florida is Fawcett Publications vs. Rand, 144 So. 2d, 512. In an opinion by Mr. Justice Horton the pleadings showed a libel against a Delaware corporation which was attacked by motion to dismiss

based on no jurisdiction. The trial judge denied the motion to dismiss and an interlocutory appeal was taken. The pleadings alleged that Fawcett Publications sold magazines to an independent contractor in Florida. Fawcett maintained no office or employees or exercised any other control after the magazines were sold and shipped from its Louisville, Kentucky office. The home office of Fawcett was located at Greenwich, Connecticut. A Third District Court reversed and held that under the circumstances, Fawcett Publications was not amenable to proper service under the Long Arm Statutes, 47.30 and 47.16. The court said that the Long Arm Statutes were very strictly construed and that the factual situation presented here showed that their foreign corporation exercised no control over personal property in Florida in the hands of brokers, jobbers, wholesalers, or distributors, and further that the pleadings did not show that the foreign corporation had some control over the people selling and distributing the product in this state.

In the case at bar the evidence clearly shows that although no effort was made to comply with the Long Arm Statutes, the applicator purchased his materials in Joppa, Maryland, and that the applicator was solely responsible for doing the job which is the subject of the dispute. Further, the manufacturer had no responsibility for the materials and for their mixing and their use on the job by the contractor. Further, that the applicator was under no control from the Maryland corporation and was not owned by the Maryland company and the Maryland corporation had no control over the employees of the Florida corporation or over the products it bought once they were shipped from Maryland. The case at bar is even stronger than the Fawcett case because no effort was made to comply with the Long Arm Statutes.

In looking at the whole problem of a state extending its territory to non-resident companies, one must keep in mind the rule that due process requires that the defendant have certain minimum contacts with the territory of the forum, and these contacts must be such that the maintenance of the suit does not offend "traditional notions of fair play" and "substantial justice."

Recent cases show that aside from the due process clause in the State and Federal Constitutions, each person is entitled to equal protection from claims, and that one cannot arbitrarily discriminate in the acquisition of persons or property in foreign states. The Long Arm Statutes have been constitutionally approved based on the standards herein enumerated, the cases cited, and on the periphery of what is permitted and what is not permitted to the state to extend its powers over citizens of other states without having them present in the geographical boundaries of the state in order to bind them to the court's jurisdiction.

This is not a case of whether there is some technical defect in the manner of acquiring jurisdiction through a constitutionally approved method, and it is not a case where there is no question that a citizen of a foreign state received notice but decided to take the bold stroke and ignore the process and refused to voluntarily appear and subject itself to the court's jurisdiction. The crux of the matter here is that the defendant did not receive notice and had no opportunity to defend, and this is the point and the basis for the prohibition that a person must be guaranteed some method, not necessarily notice, but some method to assure that a prescribed effort will be made to notify him of the pendency of the claim against him.

While responsible judges, lawyers and litigants will probably forever dispute the constitutional standard as

to what constitutes a traditional notion of fair play and what amounts to substantial justice, hardly anyone can say that it is fair play or justice to bind a citizen or a corporation of a foreign state 1000 miles from the forum, who had no notice, and that the plaintiff failed to comply with a constitutionally approved method available to it in order to guarantee a method and a record that the corporation or defendant was attempted to be reached in the foreign state.

Notice the case of Deere and Co. vs. Watts, 148 So. 2d. 529, decided by the Third District Court of Appeal in 1963 on an opinion by Judge Hendry. The suit was instituted on breach of warranty on a tractor which had overturned on plaintiff's decedent. Deere and Company, a national corporation, had offices for this particular operation in Moline, Illinois. Deere and Co. owned all of the stock of John Deere Company of St. Louis, Missouri. John Deere and Co. of St. Louis did business in Florida and the latter company was wholly owned by the parent. The corporations had common officers and the parent company set all of the policies for the captive subsidiary corporation. The Third District Court of Appeals held that they were amenable to process through the Long Arm Statutes because they were doing business in Florida and also that the elements of control were present over the Florida operation.

Notice also, this case distinguishes itself from the case at bar in that first, there was no ownership of stock in the Florida corporation; the Maryland corporation did not set any policy for the Florida corporation; it had no control over the Florida corporation, and the Maryland corporation had no contacts with reference to the Florida operation, with the exception of sales personnel calling upon it and to offer technical advice with reference to use of its materials and collection. Selling products from a foreign state which are bought by persons

in the state are not such minimum contacts or do not constitute "a business venture in the state" whereby foreign corporations are subjected to Florida state court jurisdiction, even though the Long Arm Statutes are followed.

The Constitutional Standard is also announced in the case of International Shoe Company vs. Washington, 326 U.S., 310, 66, Supreme Court, 1954.

CONCLUSION

The application of the Florida Statutes, which are mentioned herein, to the particular case at bar, makes them unconstitutional in their application to this case for the following reasons. First, it provides no standard by which a person will know when he is bound by the jurisdiction. Second, it provides inadequate time under this method. Third, it is too vague, uncertain, and indefinite, to bind a foreign corporation under the constitutional requirements of the Florida constitution, the Declaration of Rights and the United States Constitution, XIV Amendment, due process and equal protection clauses, and accordingly, your Petitioner respectively requests that the Order of the lower Court be reversed and the cause be remanded with direction for the entry of an Order dismissing the Complaint filed in this case.

Respectfully submitted,

SAMUEL KIMMEL,

Counsel for Petitioner.

KIMMEL & POKORNY
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Brief has been furnished to DUANE A. REYNOLDS of the firm of HENDERSON, FRANKLIN, STARNES & HOLT, P. O. Box 280, Fort Myers, Florida, 33902, Attorneys for Appellees, this day of January, 1968.

Of Counsel.

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JAN 24 1968
JOHN F. DAVIS, CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1048

EVERSHIELD PRODUCTS, INC.
Petitioner,

-v.-

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITIONS FOR CERTIORARI FILED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

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EVERSHIELD PRODUCTS, INC.
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vs.

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
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Petition for a Writ of Certiorari to the Supreme Court of Florida

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OCTOBER TERM, 1967

No. _____

EVERSHIELD PRODUCTS, INC.
Petitioner,

vs.

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondent.

PETITIONER'S APPENDIX

(Case Style omitted)

COMPLAINT

Come now the Plaintiffs, J. A. SAPP and D. C. SAPP, by and through their undersigned attorneys, and bring their complaint against EVERSHIELD LIQUID TILE OF FLORIDA, INC., a Florida corporation, EVERSHIELD PRODUCTS, INC., a foreign corporation and ROY I. OXENHAM, as Defendants, alleging as follows:

1. Plaintiffs are the owners and operators of a business in Lee County, Florida, known as TICE SUPER MARKET, and are residents of Lee County, Florida.

2. Defendant EVERSHIELD LIQUID TILE OF FLORIDA, INC. is a Florida corporation, having its principal place of business in either Dade County, Florida or Broward County, Florida.

3. EVERSHIELD PRODUCTS, INC. is a foreign corporation, actually doing business in Florida, and having an agent in the State of Florida.

4. Defendant ROY I. OXENHAM is a resident of Lee County, Florida, and an agent of one or both of the corporate Defendants.

5. On or about May 15, 1962, Plaintiffs entered into a contract with H. D. RUTLEDGE for the remodeling and additional construction of the business known as TICE SUPER MARKET; that the work commenced shortly thereafter and except for the matters hereinafter set forth, was completed on October 15, 1962.

6. That Defendant EVERSHIELD LIQUID TILE OF FLORIDA, INC. was a sub-contractor on the job, working under the supervision of and using materials furnished by Defendant, EVERSHIELD PRODUCTS, INC., in accordance with the specifications set forth in its advertising material and further, in accordance with the specifications set forth in the general contract.

7. That the materials furnished by Defendants through their local agent, ROY I. OXENHAM, were so defective that they did not comply with specifications and in fact, caused obnoxious strong and deleterious odors which permeated Plaintiffs' entire store, causing great quantities of food products to become non-merchantable and which Plaintiffs had to destroy.

8. That the said Defendants further caused Plaintiffs to be forced to completely tear out and rebuild two large refrigerated rooms at great expense and delay to Plaintiffs.

9. That further, Plaintiffs lost business as a result of the odors caused by the Defendants' materials, lost goodweill of their customers, and had to give refunds to many of their customers for merchandise which was not fit to eat because of the odor from Defendants' products.

10. That because of the failure on the part of Defendants to complete their contract properly within the time specified, Plaintiffs were unable to carry forward with their plans for the 1962/1963 Winter season, unable to seek a larger volume of customers, unable to handle a larger volume of merchandise, and further, incurred additional expenses by way of labor, interest on monies borrowed, additional materials and additional fees to the architects.

11. That all of the aforesaid losses and damages suffered by Plaintiffs were wholly caused by Defendants' inability to complete their contract by Defendants' use of defective materials and by Defendants' failing to use proper materials and workmanship, as called for in the contract.

WHEREFORE, Plaintiffs bring this action against Defendants, demanding damages in an amount in excess of $10,000.00 and trial by jury.

HENDERSON, FRANKLIN, STARNES & HOLT,

/s/ James A. Franklin, Jr.,

Attorneys for Plaintiffs,
P.O. Box 1111
Fort Myers, Florida

(Case Style Omitted)

DEFAULT BY CLERK

The Plaintiff herein having filed his (it's) Motion for Default and it appearing from the file herein that personal service was had on the Defendant(s):

EVERSHIELD LIQUID TILE OF FLORIDA, INC., served at 7:21 P.M. on the 12th day of August, A.D. 1963, in Broward County, Florida by Sheriff Allen B. Michell, and James G. Robeson, D.S. according to the Sheriff's return filed herein.

EVERSHIELD PRODUCTS, INC., served at 7:20 P.M. on the 12th day of August, A.D. 1963 in Broward County, Florida, by Sheriff Allen B. Michell and James G. Robeson, D.S.

Bothe corporations served by service upon George Skadding, President of EVERSHIELD PRODUCTS, INC. and EVERSHIELD LIQUID TILE OF FLORIDA, INC.,

And it further appearing from the file that Defendant(s) have neither filed nor served their written defenses within the time prescribed by law and as set forth in the Summons, it is thereupon

ORDERED that Default be and the same is hereby entered against Defendant(s) for their failure to plead, and that the amount of Plaintiff's recovery herein and damages awarded to Plaintiff, if any, be fixed by further Order of Court.

DONE AND ORDERED at Fort Myers, Lee County, Florida, this 24th day of September, A.D. 1963.

D. T. FARABEE, Clerk Circuit Court (Seal)
Lee County, Florida

by: /s/ Enid Earle
Deputy Clerk

(Case Style Omitted)

VERDICT

WE, THE JURY, find for the plaintiffs, J. A. SAPP and D. C. SAPP d/b/a TICE SUPER MARKET, and against the Defendants in the amount of $12,500.00

SO SAY WE ALL.

/s/ James W. Hughes
Foreman

(Case Style Omitted)

FINAL JUDGMENT

This matter having come on for trial, and a jury having been duly impaneled, and it appearing that due and proper notice of same was given to Defendants, and Plaintiffs having presented their testimony in open court, and a jury having returned the following Verdict:

"We, the Jury, find for the Plaintiffs, J. A. SAPP and D. C. SAPP d/b/a TICE SUPER MARKET, and against the Defendants in the amount of $12,500. So say we all.";

and the Court being fully advised in the premises, it is thereupon ORDERED AND ADJUDGED that Plaintiffs do have and recover of and from Defendants the amount of $12,500, together with their costs herein expended in the amount of $45.00, for which let execution issue.

DONE AND ORDERED at Fort Myers, Lee County, Florida, this 4th day of December, 1964.

/s/ Lynn Gerald
Circuit Judge

(Case Style Omitted)

PETITION

In this cause comes EVERSHIELD PRODUCTS, INC., a body corporate under the laws of the State of Maryland, incorporated on August 1, 1954, with its principal place of business at 801 Philadelphia, Road, Joppa, Maryland, by and through its undersigned attorneys, PAVESE, WALDORF, SHIELDS & D'ALESSANDRO, and enters its special appearance in this cause to point out to the Court that is has no jurisdiction of this Defendant.

I.

EVERSHIELD PRODUCTS, INC., is a manufacturer of formulated polyester resins. The President of the company is PAUL J. PETRLIK. The process issued in this cause seeking to bind EVERSHIELD PRODUCTS, INC., was served on GEORGE SKADDING, President, on the 12th day of August, 1963, in Broward County, Florida. The said GEORGE SKADDING was not in fact the President of the Petitioner (See affidavit of PAUL J. PETRLIK, President, which is made a part hereof and incorporated herein by reference.) and was not a representative, agent, director, servant, or employee of EVERSHIELD PRODUCTS, INC., and in fact he bears no relationship to the company in any regard whatsoever.

II.

EVERSHIELD PRODUCTS, INC. was never served with process in this cause through the Secretary of State's office and in fact it does not do business in the State of Florida by distributing its products through brokers, jobbers, wholesalers, distributors, or retailers, and it has no place of business within the boundaries of the State of Florida and possesses no resident agent in the State of Florida.

III.

EVERSHIELD PRODUCTS, INC. bears no corporate relationship in fact or in law with EVERSHIELD LIQUID TILE OF FLORIDA, INC. and there is no corporate connection or affiliation between the two companies nor is there any corporate control or influence by one over the other; but they are two separate and entirely distinct corporations bearing no relationship with each other in any manner.

IV.

EVERSHIELD PRODUCTS, INC. has never received a bill of complaint in this cause and never had any service of process delivered into its hands either directly or constructively, and therefore, is not a party to these proceedings in fact and in law.

PREMISES CONSIDERED, Petitioner prays:

That the verdict and judgment of the Court be amended to strike it as a party, and that the records of the Court be expunged to show that EVERSHIELD PRODUCTS, INC., is not bound by the judgment of the Court because of lack of notice.

This 11th day of January, 1965.

EVERSHIELD PRODUCTS, INC.

By: /s/ Paul J. Petrlik
President

/s/ William H. Shields
Attorney for Petitioners
of Counsel
PAVESE, WALDORF, SHIELDS, & D'ALESSANDRO
Fort Myers, Florida
and

JOSEPH K. POKORNY
of HENNEGAN, CHIPMAN & KIMMEL
404-408 Jefferson Building
105 West Chesapeake Avenue
Towson 4, Maryland

STATE OF MARYLAND

COUNTY OF BALTIMORE

Before me, the undersigned authority, personally appeared PAUL J. PETRLIK, who being first duly sworn, deposes and says that he is the President of EVERSHIELD PRODUCTS, INC., the Petitioner in this cause, and he is its agent for the purpose of this Petition and the making of this affidavit; that he has read the foregoing Petition and knows the contents thereof and that the same are true.

/s/ Paul J. Petrlik

Sworn to and subscribed before me on this 11th day of January, 1963.

/s/ Margaret R. Flinchpaugh
Notary Public

My Commission Expires:
May 3, 1965
(Seal

(Certificate of Service)

AFFIDAVIT

1. Evershield Products, Inc. is a body corporate of the State of Maryland, duly incorporated under the laws of the State of Maryland on August 1, 1954. Its principal office is located at 801 Philadelphia Road, Joppa, Maryland,

21085. The corporate officers are: Paul J. Petrlik, President, Margaret A. Petrlik, Treasurer, and Edward M. Rohm, Secretary; its resident agent is Paul J. Petrlik, Joppa, Maryland.

2. Evershield Products, Inc. is a manufacturer of formulated Polyester Resins and same is sold throughout the United States.

3. As an aid for the sale of the Polyester Resin manufactured by Evershield Products, Inc., Evershield Products, Inc. has developed and produced advertising setting forth, in a general manner, uses and applications for this product.

4. Evershield Liquid Tile of Florida, Inc. is a user of the polyesters manufactured by Evershield Products, Inc. but is not in any manner connected with, nor affiliated with Evershield Products, Inc., nor is there any corporate control or influence by one over the other.

5. Service of process in the matter of J. A. Sapp and D. C. Sapp d/b/a Tice Super Market, Plaintiffs, vs. Evershield Liquid Tile of Florida, Inc., Evershield Products, Inc. and Roy I. Oxenham, Defendants, was made on George Skadding, a resident of the State of Florida as resident agent for Evershield Products, Inc. Evershield Products, Inc. does not have a resident agent for the State of Florida and George Skadding is not and never was a representative, officer, director, agent, servant and/or employee of Evershield Products, Inc.

6. Evershield Products, Inc. has never received a Bill of Complaint concerning the Law Case L 939 and Service of Process was never delivered into the hands of the Secretary of State of Maryland.

/s/ Paul J. Petrlik, President
Evershield Products, Inc.
Joppa, Maryland

STATE OF MARYLAND

CITY OF BALTIMORE

I HEREBY CERTIFY that on this 4th day of January 1965, before me, the subscriber, a Notary Public in and for the City of Baltimore, State of Maryland, personally appeared PAUL J. PETRLIK, President of Evershield Products, Inc., and he made oath in due form of law that the matters and facts contained in the foregoing AFFIDAVIT are true to the best of his knowledge, information and belief.

As Witness my Hand and Notarial Seal.

/s/ Mary E. McGlone
Notary Public

My Commission expires:
May 3, 1965
(Seal)

(Case Style Omitted)

REPLY TO PETITION

COMES NOW, Plaintiffs, J. A. SAPP and D. C. SAPP, d/b/a TICE SUPER MARKET, by and through their undersigned attorneys, and files this their reply to the petition filed by defendant, EVERSHIELD PRODUCTS, INC., a Maryland corporation, and says:

1. That said plaintiffs deny each and every allegation in the petition which is not specifically admitted herein and demands strict proof thereof.

2. That said plaintiffs admit the following:

A. EVERSHIELD PRODUCTS, INC. is a manufacturer of formulated polyester resins; and

B. That process was duly issued and served in this cause on August 12, 1963.

AFFIRMATIVE DEFENSES TO PETITION

Plaintiffs, J. A. SAPP and D. C. SAPP, d/b/a TICE SUPER MARKET, specifically allege that defendant, EVERSHIELD PRODUCTS, INC., was duly served with process in this cause on August 12, 1963; that said defendant did in fact have notice that the complaint and summons had been issued in this cause and that said complaint and summons had been served upon GEORGE SCADDINGS as president of the company; that said defendant did receive a copy of the complaint in this cause in a letter from C. E. TOZZI to HARRY HARRIS September 11, 1963, a copy of said letter being forwarded to PAUL PETRLIK; that said defendant was at all times advised as to the status of the suit by the said plaintiffs and were forwarded a copy of the notice of trial on damages on November 20, 1964; that said defendant had notice of the trial on damages, and did not take any steps to contest the jurisdiction of the court.

WHEREFORE, Plaintiffs, J. A. SAPP and D. C. SAPP, d/b/a TICE SUPER MARKET, having fully answered petition of defendant, EVERSHIELD PRODUCTS, INC., a Maryland corporation, pray that this Honorable Court dismiss said petition with prejudice.

HENDERSON, FRANKLIN, STARNES & HOLT

By: /s/ Duane A. Reynolds

(Certificate of Service)

(Case Style Omitted)

ORDER DENYING PETITION OF
EVERSHIELD PRODUCTS, INC.

The Petition filed by Defendant, EVERSHIELD PRODUCTS, INC., a Maryland corporation, duly came on for hearing pursuant to notice before the undersigned Judge on July 27, 1965 and after duly considering the evidence offered in support of said petition by said Defendant, EVERSHIELD PRODUCTS, INC., and the evidence offered on behalf of Plaintiffs, J. A. SAPP and D. C. SAPP, d/b/a TICE SUPER MARKET, and after duly considering the arguments of Counsel and the Court having found that said Defendant was duly served with a copy of the Complaint and Summons in this cause by service upon an agent of the said foreign corporation transacting business for it in the State of Florida, further finding that the officers of said corporation received a copy of the Complaint and Summons by registered mail and further finding that said Defendant had forenotice of said suit and an opportunity to defend and further finding said Defendant chose not to raise the jurisdictional question until after the case had been tried before a jury and a verdict rendered and judgment entered in this cause, and the Court further finding that said Defendant did business in the State of Florida through a broker, jobber or distributor, to-wit, EVERSHIELD LIQUID TILE OF FLORIDA, INC., and the Court further finding that strong economic ties existed between Defendant, EVERSHIELD PRODUCTS, INC., and Defendant, EVERSHIELD LIQUID TILE OF FLORIDA, INC., and the Court being fully advised in the premises is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That the petition of the Defendant, EVERSHIELD PRODUCTS, INC., a Maryland corporation to strike said

Defendant from the verdict and judgment of the Court in the above cause for reason that the Court is without jurisdiction of said Defendant, be and is hereby denied.

2. That the service of process obtained against Defendant, EVERSHIELD PRODUCTS, INC., be and is hereby confirmed in that service was obtained pursuant to laws of the State of Florida and that said Defendant was given notice and opportunity to defend the said suit.

3. That the verdict and judgment entered in this cause on behalf of Plaintiffs, J. A. SAPP and D. C. SAPP, d/b/a TICE SUPER MARKET, against the Defendants, EVERSHIELD LIQUID TILE OF FLORIDA, INC., and EVERSHIELD PRODUCTS, INC. be and are hereby confirmed, ratified and approved.

DONE AND ORDERED at Fort Myers, Lee County, Florida, this 14th day of October, 1965.

/s/ Lynn Gerald
Circuit Judge

(Case Style Omitted)

NOTICE OF APPEAL

EVERSHIELD PRODUCTS, INC., a Maryland corporation, hereby takes and enters its appeal to the District Court of Appeal of Florida, Second District, to review the Order of the Circuit Court for Lee County, Florida, bearing date October 14, 1965, and filed for record October 14, 1965. The defendant, EVERSHIELD PRODUCTS, INC., filed a petition to have the Judgment vacated and declared void because it was not served with process in this cause. The plaintiffs joined issue with the petition, evidence was taken by the court, and the

court denied this defendant's petition to vacate and void the judgment. The nature of the order appealed from is an Order Denying Petition of Evershield Products, Inc. to declare the judgment void as against this defendant.

All parties to said cause are called upon to take notice of the entry of this Appeal.

This 18 day of November, A.D. 1965.

/s/ William H. Shields

OF COUNSEL:
PAVESE, WALDORF, SHIELDS & D'ALLESSANDRO

(Certificate of Service)

(Case Style Omitted)

ASSIGNMENT OF ERRORS

One of the defendants in this cause, EVERSHIELD PRODUCTS, INC., a Maryland corporation, hereby assigns the following errors to be asserted and relied upon by it in its appeal heretofore entered in this cause:

1. The Court erred in that the defendant, EVERSHIELD PRODUCTS, INC., did not receive notice of the filing of the Complaint and was not served with process.

2. That the record on appeal shows that the summons was served on the wrong party which did not bind Evershield Products, Inc. because said defendant had no notice.

3. That the constitutional rights of Evershield Products, Inc. were violated in that the procedure did not constitute due process of law under Sections 4 and 12 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States, and it further violated the Equal Protection Clause of the Constitution of the United States of America.

4. The Court erred in denying the Petition to Vacate the Judgment and declare it void as to Evershield Products, Inc.

Dated this 18 day of November, A.D. 1965.

/s/ William H. Shields

OF COUNSEL:
PAVESE, WALDORF, SHIELDS & D'ALLESSANDRO

(Certificate of Service)

OPINION OF DISTRICT COURT OF APPEAL SECOND DISTRICT OF STATE OF FLORIDA

(Case style omitted)

Opinion filed February 10, 1967.

Appeal from the Circuit Court for Lee County. Lynn Gerald, Judge.

William H. Shields of Pavese, Waldorf, Shields & D'Alessandro, Fort Myers, for Appellant.

Duane A. Reynolds of Henderson, Franklin, Starnes & Holt, Fort Myers, for Appellees.

IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JANUARY TERM,
A.D. 1967

Case No. 6833

PIERCE, Judge.

This is an appeal by Evershield Products, Inc., from an order sustaining service of process theretofore obtained upon it and confirming the verdict and judgment rendered pursuant to such service.

Evershield Products, Inc., hereinafter referred to as Evershield Products, is a Maryland corporation and is the manufacturer of a resin commodity used in construction or remodeling of certain types of freezer units. Evershield Liquid Tile of Florida, Inc., hereinafter referred to as Evershield Liquid Tile, is a Florida corporation and sells, dispenses and services said resin substance, and is generally known as the "applicator".

In May, 1962, plaintiffs J. A. and D. C. Sapp were doing business as Tice Super Market in Fort Myers and contracted with one Rutledge for remodeling and enlargement of their business structure, in the process of which Evershield Liquid Tile was a sub-contractor in the application of liquid tile, manufactured by Evershield Products, in constructing a refrigerated icebox in the remodeling of the grocery store building. After completion of the icebox, extremely pungent, obnoxious and deleterious odors emanated from where the meats and produce were kept and permeated the entire building, causing considerable loss to the merchandise and produce stored in the building and necessitating the re-building of certain portions of the structure.

Plaintiffs Sapp brought suit in the Lee County Circuit Court against the two corporations, one as the manufacturer and the other as the servicing medium, of the allegedly defective material, averring substantially the foregoing facts. Separate summonses for each corporation were sent to Fort Lauderdale, where they were each served by the Sheriff of Broward County upon one "George Skadding, President of said corporation." In other words,

Skadding was served separately "as President" of the Maryland corporation and also the Florida corporation.

Evershield Products made no appearance in the Cir-Court suit and default was entered against it. Thereafter a jury, after an ex parte trial, returned a verdict against both corporations for $12,500.00, upon which a verdict judgment was entered on December 4, 1964.

Thereafter on January 13, 1965, Evershield Products filed petition in the Circuit Court proceeding, alleging that Skadding was not on August 12, 1963, the date he was served in Broward County, either the President of Evershield Products or had any relationship with the company; that the president of the company is and was one Paul J. Petrlik; that the corporation was never served with process through the Secretary of State's office, that it did not do business and had no place of business and no resi dent agent in the State of Florida. that it bore "no corporate relationship" with Evershield Liquid Tile, but they were two "distinct corporations"; that Evershield Products had never received copy of the complaint in the case nor ever had any process "delivered into its hands"; and that therefore it was "not a party to these proceedings in fact and in law." The petition prayed that the verdict and judgment aforesaid "be amended to strike" Evershield Products as a party, and that "the records of the Court be expunged" to eliminate the corporation from being bound by the judgment "because of lack of notice."

Plaintiffs in the suit filed a reply to the petition aforesaid, admitting that Evershield Products was "a manufacturer of formulated polyester resins" and that process was duly issued and served in the cause on August 12, 1963, but denying all other allegations in the petition. By way of "Affirmative Defenses" to the petition, plaintiffs set forth that not only was Evershield Products duly served with process but that said corporation "did in fact

have notice that the complaint and summons had been issued," that George Skadding had been served as the purported president of the company, that a copy of the complaint had been sent by letter on or about September 11, 1963, to "Paul Petrik,"[1] the actual President; that Eversheld Products "was at all times advised as to the status of the suit" and had "notice of trial on damages on November 20, 1964 * * * and did not take any steps to contest the jurisdiction of the court."

On October 14, 1965, after full hearing and taking of adversary testimony, the Circuit Judge entered order denying the petition of Eversheld Products and confirming the verdict and judgment against the corporation. In conjunction with said order the Judge made findings of fact from the evidence substantially as follows:

> that Eversheld Products was duly served with copy of Complaint and Summons "by service upon an agent of" the corporation "transacting business for it in the State of Florida";
>
> that the officers of Eversheld Products "received a copy of the Complaint and Summons by registered mail";
>
> that the corporation "had forenotice of said suit and an opportunity to defend";
>
> that the corporation "chose not to raise the jurisdictional question until after the case had been tried before a jury and a verdict rendered and judgment entered";

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[1] The name had previously been legally changed from "Petrlik" to "Petrik," and is referred to interchangeably in the record here.

that Evershield Products "did business in the State of Florida through a broker, jobber or distributor," namely, Evershield Liquid Tile;

that "strong economic ties existed between" Evershield Products and Evershield Liquid Tile; and

generally "that service was obtained pursuant to the laws of the State of Florida and that said (Evershield Products) was given notice and opportunity to defend the said suit."

Evershield Products has appealed to this Court from said order aforesaid and assigns as error the findings and conclusions of the Circuit Judge. We affirm.

The crux of the appeal is whether, under the laws of Florida, Evershield Products received notice of the Circuit Court suit in such manner as would accord with the requirements of procedural due process, and whether the requirements of the Florida statutes were substantially complied with.

From the foregoing specific findings made by the trial Judge two major factual postulates may be deduced: (1) Evershield Products was doing business in Florida through a broker, jobber or distributor, namely, Evershield Liquid Tile, and that there were strong economic ties existing between the two corporations; and (2) Evershield Products, through its Maryland officers, had actual personal notice of pendency of the Florida suit by having received copy of the complaint and summons by registered mail in ample t me to defend, and also having been served with actual process in personam through an agent transacting business for it in Florida.

Since 1951 Florida has had upon its statute books what are known as the Long Arm statutes, which, as the term implies, reach out to render amenable to the Florida

state courts foreign corporations doing business within the State of Florida, and which are so intended. These Long Arm statutes, or more precisely the "Florida Long Arm Jurisdiction Statutes" have been enacted, and subsequently enlarged and amended, since 1951. Two of these statutes are pertinent to this case, and appear as Secs. 47.16 (1) and (2), and 47.17. These sections are carried herewith in the margin.[2]

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[2] §47.16 F.S. Service of process upon nonresidents engaging in business in state.

(1) The acceptance by any person or persons, *** who are residents of any other state or country, and all foreign corporations, *** of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, which shall be deemed equivalent to an appointment by such persons and foreign corporations of the secretary of state of the state as the agent of such persons or foreign corporations upon whom may be served all lawful process in any action, suit or proceeding against them *** arising out of any transaction or operation connected with or incidental to such business or business venture, and the acceptance of such privilege shall be signification of the agreement of such persons and foreign corporations that any such process against them *** shall be of the same legal force and validity as if served personally on such persons or foreign corporations. Service of such process shall be in accordance with and in the same manner as now provided for service of process upon nonresidents under the provision of §47.30. Provided that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute.

An interesting and instructive discussion of the antecedent history of the "Long Arm" statutes is found in the Mooney Aircraft case, infra (text 332 F.2d 137, et seq) - interesting in that it vividly depicts the "ins and outs" of the Florida law, both statutory and case law; and instructive in that it shows the clear intent of the Florida legislature in enacting the "Long Arm" statutes. It seems that the Federal Court of Appeals, 2nd Circuit, in Berkman v. Ann Lewis Shops, Inc., 246 F.2d 44, affirmed a Federal District Court, 142 Fed. Supp. 417,

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2 (Continued)

(2) Any person, firm or corporation which through brokers, jobbers, wholesalers or distributors sells, consigns, or leases, by any means whatsoever, tangible or intangible personal property, to any person, firm or corporation in this state, shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business or business venture in this state.

§47.17 Service of process on private corporation. - Process against any corporation, domestic or foreign, may be served,

(1) (on president, vice president)
(2) (on cashier, treasurer, etc.)
(3) (on director of the company)
(4) Upon any officer or business agent, resident of the state.
(5) If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state.
(6) (section not applicable insurance companies)
(7) The provisions of this section shall be cumulative to all existing laws.

which held the original 1951 Long Arm statute "inadequate to sustain an earlier Florida state court judgment" but in so holding observed that "this is not to say that a statute might not constitutionally be drawn which would make the presence in any State of a wholly-owned subsidiary of a foreign corporation sufficient basis to assert jurisdiction over the parent company," 142 Fed. Supp., text 422. Florida instantly reacted in a "legislative reflex" to the Berkman decision "by adding sub-section (2) to Section 47.16 *** so as to encompass distributors, jobbers, wholesalers, and brokers for foreign corporations." And, to use the colorful language in Mooney Aircraft (text 332 F.2d at page 138), Florida's Long Arm "muscles were beefed up by the legislative declaration of policies stated in emphatic terms" in the 1957 amendment (now appearing as Sec. 47.16(2) F.S.), as follows:

> "WHEREAS, persons, firms and corporations in other jurisdictions are directly or indirectly furnishing millions of dollars worth of tangible and intangible personal property to persons, firms and corporations in this state each year; and
>
> "WHEREAS, litigation in both tort and contract frequently arises out of the purchase, lease, consignment, use and consumption of such property each year; and
>
> "WHEREAS, the cost and expense of going to other jurisdictions, both national and international frequently has the practical effect of denying all rights and remedies regarding such purchase, lease, consignment, use and consumption; and
>
> "WHEREAS, it is just and fair that such litigation be conducted in this state rather than in a foreign jurisdiction."

Section 47.16 (1), F.S. provides that any foreign legal entity, natural or corporate, who "accepts *** the privilege" of engaging "in business or a business venture" in Florida or has an office in the State shall be deemed to have appointed the Secretary of State of Florida as his agent for acceptance of process in the State courts in any suit "arising out of any transaction or operation connected with or incidental to such business or business venture"; provided that if the Florida entity has a resident agent in Florida process shall be served upon such resident agent; and provided further, that process shall be served as provided upon nonresidents in Section 47.30 (Emphasis supplied). Sub-section 2 of Section 47.16 provides that any person or corporation who sells or consigns personal property to any legal entity in Florida "through brokers, jobbers, wholesalers or distributors" shall be conclusively presumed to be carrying on a business or business venture in this State.

Section 47.17 provides that if a foreign corporation has no officers, directors or agents in Florida, "service may be made upon any agent transacting business for it in this State" (Emphasis supplied).

Section 47.30 provides for service of process upon the Secretary of State.

The trial judge's findings that Evershield Products was doing business in Florida through Evershield Liquid Tile as "broker, jobber or distributor" of its resinous materials and that "strong economic ties" existed between the two companies were amply supported by competent, substantial evidence adduced at the hearing, and must be accepted by this court for purpose of decision here. Substantial monetary credit was extended by Evershield Products to the Florida corporation. Evershield Products supplied it with sales assistance and advertising materials and sold and distributed its products to Evershield Liquid

Tile. Evershield Liquid Tile originally came into being when Skadding and Paul J. Petrlik, President of Evershield Products, "decided to form the corporation and go into business in the State of Florida" as the "official applicators" of Evershield Products' materials. Also, Petrlik was president of Florida Liquid Tile when it was first organized. Such facts, shown by large uncontradicted testimony, sustained the findings referred to.

Likewise, the trial judge's findings that Evershield Products "had forenotice of said suit and an opportunity to defend" and that its officers had received a copy of the complaint and summons by registered mail, is supported by competent, substantial evidence. When Skadding was first served with the papers in Fort Lauderdale, he "called up" Harry H. Harris, then the operating manager of Evershield Liquid Tile, who immediate came over and "got the papers and said he would take care of it," according to Skadding. Harris forthwith delivered the papers, comprising a copy of the summons and complaint, to Chester E. Tozzie, district adjuster of Travelers Insurance Company, the insurance liability carrier, who acknowledged receipt thereof by letter dated September 11, 1963, to Harris. Tozzie sent copy of that letter, together with copy of the summons and complaint, to Evershield Products in Maryland by registered mail, attention of "Paul Petrlik," its President, "in order (as he stated in the letter) that they may properly defend themselves in this matter."

The copy of letter and Court papers were received by Evershield Products and receipted for on September 16, 1963, by one Betty Jane Bragg, who was later identified by president Petrlik as being affiliated with the Maryland office. Tozzie had previously procured an extension of time to September 23, 1963, "before a default judgment" would be taken against Evershield Products, to provide

additional time to defend, which fact he mentioned in his letter. The default judgment was not taken against Evershield Products until September 24, 1963. Mr. Harris later admitted in his testimony that "they (Travelers Insurance Company) investigated it and sent me a letter and said they had no defense." These facts sustained the findings that Evershield Products had notice and knowledge of the suit.

Delray Beach Aviation Corp. v. Mooney Aircraft, Inc., CCA 5, 1964, 332 F. 2d 135, was a case identical in principle with the case subjudice. There the commodity involved was airplanes, which were manufactured in Texas by Mooney Aircraft, a Kansas corporation, and distributed in Florida by and through Metropolitan Aircraft corporation, a Florida corporation. Suit was brought in the Florida state court by a purchaser of one of the airplanes against Mooney Aircraft for damages resulting from "the total loss of the plane when it crashed in Florida allegedly due to faulty manufacture." The plane had been bought by Delray through Metropolitan as the distributor.

Plaintiff Delray had obtained a default judgment against Mooney Aircraft in the Florida state court and had then sought enforcement of the judgment in a Federal District Court, and Delray appealed. The sole point involved was the amenability of Mooney Aircraft to the Florida state court, which had sought to acquire jurisdiction over Mooney Aircraft through utilization of the same Long Arm statutes here involved. The Court of Appeals, Fifth Circuit, found the Florida statutes entirely consonant with due process and held the Florida state court judgment entitled to "full faith and credit."

The only difference between Mooney Aircraft and the instant case is that in Mooney the foreign corporation did not deny actual notice of the proceedings against it, whereas here, Evershield Products does deny receiving actual

notice. But it is "a distinction without a difference" for the reason that the trial Judge here found as a fact, in the light of sworn evidence, that Evershield Products did receive actual notice. Mooney holds inter alia as follows (text 332 F.2d 141):

"Holding, as we do, that by virtue of its operations through Metropolitan, its distributor, §47.16 (1) (2), Mooney Aircraft was engaged in business activity within the State of Florida and therefore amenable to service of process, the question still remains whether the manner of service was proper. There is no question about actual notice. Mooney Aircraft was informed on at least four occasions, twice by the counsel for the State Court plaintiffs, and twice by Metropolitan, that the suit had been filed. Guided by its president-lawyer-witness, cf. Rachal v. Allen, 5 Cir., 1963, 321 F.2d 449, 451 (dissenting opinion), Mooney deliberately took the bold course of ignoring the Florida summons. Any lurking due process problems are therefore narrowly confined to the question of whether the Florida statutory structure reasonably assures that the nonresident will have fair notice and an opportunity for a fair defense. See Wuchter v. Pizzutti, 1928, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A.L.R. 1230. National Equipment Rental, Limited v. Szukhent, 1964, 375 U.S. 311, 84 S. Ct. 411, 11 L.Ed. 2d 354, 357.

* * * * * * *

"Although Metropolitan and Mooney Aircraft did not stand in the traditional relationship of principal and agent, their close economic business ties were sufficient to satisfy the Florida standard that there be a 'legal or moral duty on

the part of the (agent) to report and properly handle a summons served on him as agent of' the foreign corporation. Mason v. Mason Prod. Co., Fla., 1953, 67 So. 2d 762, 763.

"This principle is followed by numerous courts. In Fiat Motor Co. v. Alabama Imported Cars, Inc., 1961 110 U.S. App. D. C. 252, 292 F. 2d 745, 747, the Court held that the District of Columbia Code provision for service 'on the agent of such corporation or person conducting its business' was broad enough to cover a distributor similar to Metropolitan since the distributor 'occupies such a responsible representative status as to make it reasonably certain that he will turn over the process.' That Court cited our earlier decision in Acme Eng'r, Inc. v. Foster Eng'r Co., 5 Cir., 1958, 254 F.2d 259. Of course this approach was recognized in International Shoe where the Court stated that it 'is enough that (the foreign corporation) has established such contacts with the state that the particular form of substituted service adopted *** gives reasonable assurance that the notice will be actual.' 326 U.S. 310, at 320, 66 S. Ct. 154, at 160, 90 L. Ed. 95, 161 A.L.R. 1957. (Emphasis supplied).

* * * * * * *

"As we said in Acme Eng'r, Inc., of a Texas 'traveling salesman,' Metropolitan here 'occupies such a responsible representative status as to make it reasonably certain that (it) will turn over the process to his company.' And there, as here, the fact that the representative 'actually passed (the process) on' may be considered in determining that reasonable probability. 254 F.2d 259, 263. It is this strong compulsion, whether described as a moral or a legal duty, to transmit the process on to the

nonresident which supplies what was held to be the missing compunction in Wuchter v. Pizzutti, 1928, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446."

In the instant case, service was not made upon the Secretary of State, as provided in Sec. 47.30 F.S. But neither was it in Mooney Aircraft. The opinion in Mooney held that service upon "any agent" under Section 47.17 F.S. meant, to all intents and purposes, "any resident agent" such as its distributor Metropolitan, and that it was not obligatory for a plaintiff to pursue Sec. 47.30. On this point Mooney holds as follows:

"The process was not served on the Florida Secretary of State. Rather, the service was made on Metropolitan (through its vice-president) as the resident agent, in the absence of the president, vice president, cashier, treasurer, secretary, general manager and director' of Mooney Aircraft. As we understand Mooney Aircraft's contention, it is this. Although Metropolitan, the so-called resident agent, sent the process on so that Mooney Aircraft had direct, positive, written, official information as to the pendency of the suit and the purported service of process on it, Metropolitan was not a 'resident agent' and therefore as a matter of technical Florida statutory requirement, the service was imperfect. This necessarily assumes that had the service been had upon the Secretary of State, it would have been technically sufficient. The additional claim is then made that since the statute does not expressly compel the 'resident agent' to transmit the process to the foreign corporation, there is no assurance that it would be received, and hence the statute is constitutionally deficient.

"The last two sentences of § 47.16 (1) prescribe that the service of the process 'shall be in accordance

with and in the same manner as now provided for *** under the provision of §47.30.' The last adds a proviso 'that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute.' This brings into play § § 47.30 and 47.17.

"Guided, as we must be, by the Florida standard concerning the attributes of one having the status of an 'agent' for service of process, we think that Metropolitan was 'a resident agent' and that service of process 'upon such resident agent' was permissible. The District Judge seemed to think that Metropolitan could not be acting for Mooney Aircraft since each was engaged in its own separate business within the State of Florida. If that means that factually Mooney Aircraft was carrying on business within this assigned territory in its own right independent of Metropolitan, there is no basis in fact for such a finding. F.R. Civ. P. 52(a). If it means to imply that one cannot be a resident agent if his own interests are being advanced while serving the so-called principal, we think it is erroneous in law. Indeed, any such reasoning would be a repudiation of §47.16 (1) and especially subsection (2). Under subsection (1), the acceptance by a nonresident 'of the privilege *** to operate, conduct, engage in, or carry on a business or business venture in the state' is deemed to be an appointment of the secretary of state as the resident agent. Under subsection (2), anyone who 'sells, consigns, or leases, by any means whatsoever' personal property 'through brokers, jobbers, wholesalers, or distributors' shall be 'conclusively presumed to be operating, conducting, engaging in or carrying on a business or business venture in this state'."

Evershield Products had the full, unrestricted right, if it deemed service of process upon it in Florida to be

defective in any way, to have the validity of such service tested out in the Circuit Court proceedings, and without in any way submitting itself to the jurisdiction of said Court on the merits if it should be determined that jurisdiction on the merits had not been acquired. This was succinctly pointed out in Mooney Aircraft in the following language (332 F.2d 144):

> "And in assaying the federal constitutionality of the Florida Statute, we must certainly look at it in the light of Florida procedures which afford to a nonresident defendant a full and unconditional opportunity to contest jurisdiction over the person of the defendant to the bitter end. Rule 1.11 (b), 1954, Florida Rules of Civil Procedure, 30 F.S.A., copied from F. R. Civ. P. 12, allows the defense of '*** (2) lack of jurisdiction over the person *** (4) insufficiency of process, (5) insufficiency of service of process ***' to be made by motion. The rule was adopted with the purpose of abolishing former distinctions between general and special appearances, see Greenburg v. Greenburg, Fla. Dist. Ct. App., 1958, 101 So. 2d 608, and the Supreme Court in State of Florida ex rel. Eli Lilly and Co. v. Shields, Fla., 1955, 83 So. 2d 271, has held that objection to the Court's jurisdiction over the person of the defendant is not waived or prejudiced by participation in the trial and defense after the objections are overruled.
>
> "That means that Mooney Aircraft, armed with full, correct copies of the State Court pleadings and process, with detailed specific information from Metropolitan concerning the pendency of the case and the right under Florida practice to enter a special appearance, had a full, unrestricted opportunity to have the Florida Court pass upon its own statute and

> the sufficiency of the facts to support either amenability or the method of service, with right to review to the United States Supreme Court thereafter as to any federal constitutional questions. Of course the presence of this sensible and fair procedure does not compel a nonresident to submit either for the determination of that issue or the trial of the merits of the case. But in no sense does the risk of standing one's ground on amenability to process carry with it a forfeiture of the right to present a defense. That Mooney Aircraft has lost that opportunity is the consequence of its own deliberative choice to take the bold course." (Emphasis supplied).

Here, as in Mooney Aircraft, the nonresident voluntarily and knowingly elected to ignore the service of process upon it in Florida, and having made such election, it cannot now complaint that, such service being now upheld, the judgment which it suffered not to resist is allowed to stand.

The decisions of the Florida appellate courts are consistent with the foregoing quoted holdings in Mooney. In Mason v. Mason Products, Co., Fla. 1953, 67 So. 2d 762, appellant-plaintiff Mason sought to bind the foreign corporation, Mason Products Co., appellee-defendant, in the state court suit by service upon a person "as business agent" of defendant. The facts as to the relationship of the person so served with the defendant corporation are succinctly stated by Justice Drew in the opinion:

> "The salesman upon whom process was served was regularly employed by a stranger to appellee. One day the salesman observed an advertisement of appellee and answered it. Appellee sent him a catalogue and a form letter and booklet telling him about appellee's product and how to place orders.

His compensation was the down payment set forth in the catalogue which, in the event of a sale, he retained. The order was then sent to appellee in a foreign state, was subject to its acceptance, and if accepted the product was shipped to the customer C.O.D. The salesman knew nothing about the appellee, had no contract with it, and outside of members of his family had taken orders from only two persons, one of whom was appellant."

In holding the service to be invalid as binding the foreign corporation under the foregoing facts, the opinion goes on to state as follows:

"The record shows no relationship of the character which would create either a legal or moral duty on the part of the salesman to report and properly handle a summons served on him as agent of the appellee. To hold that under such circumstances service on such person is sufficient to give the courts of this state jurisdiction to enter a judgment against the appellee offends every principle of justice and due process. After all, it is fundamental that due process requires notice and a fair opportunity to be heard, but this principle has been circumscribed by the admonition that such contracts must not offend traditional notions of fair play and substantial justice. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1957. We think the situation here falls squarely in the latter cateogry and that the service on the salesman was invalid.

* * * * * * *

"Each case of this kind must reset on its own bottom for the simple reason that whether service is valid depends on what the facts are. There is no way to lay down a general principle applicable to all cases."

In Zirin v. Pfizer & Co., Inc., plaintiff Zirin had sought to bind the non-resident corporate defendant Pfizer & Co. under Sec. 47.171 F.S.[3] rather than Sec. 47.17 (see marginal note 2, supra) because the effective date of the latter section had not accrued at the time of service, the opinion strongly implying, however, that if Sec. 47.17 had been applicable the service would have been clearly valid. But the opinion, again written by Justice Drew, held that even under Sec. 47.171 a foreign corporation was amenable to state court process upon its agent in the state even though the foreign corporation was "not qualified to do business in Florida," the only condition being that the suit could "apply only to obligations or causes of action which arose out of the activities of the corporation in the State." Relying heavily upon International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1957, the opinion goes on to lay down the yardstick as follows:

"In these days of jet airplanes and modern communications, it cannot be logically argued

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[3] 47.171 Service of process; domestic and foreign corporations

When any domestic or foreign corporation shall fail to comply with §47.34 and 47.35 relating to the designation of the place for service of process, or in the alternative, with §47.36, relating to the designation of the office of the clerk of the circuit court as a place for service of process, then process directed to any domestic corporation failing to comply with said sections may be served upon any officer or agent of such domestic corporation resident in the state or transacting business for it in the state. Process directed to any foreign corporation failing to comply with said sections may be served upon any agent of such foreign corporation transacting business for it in Florida.

> that the trial of such a cause away from home or principal place of business of the corporation imposes any undue hardship upon it. The Courts of this State are always open to the use of such corporations to enforce obligations owed it by Florida citizens. There is no reason why, under the circumstances and subject to the limitations mentioned, the courts of this State should not be available to its own citizens to enforce the obligations of the foreign corporation."

The opinion in Zirin summarized by saying that "if the record in the instant case established that the cause of action being sued upon was one which arose out of the activities of the defendant corporation in this State, we would approve" the service of process as made. In the case subjudice the cause of action of plaintiffs Sapp "arose out of the activities of the foreign corporation within this State"; in fact, it was bottomed upon the alleged noxious and deleterious character of the material manufactured by Evershield Products and for which Evershield Liquid Tile was its Florida "applicator."

In H. Bell & Associates, Inc. vs. Keasbey & Mattison Co., Fla. App. 1962, 140 So. 2d 125, plaintiff Keasbey, a Pennsylvania corporation, sued Bell, an Illinois corporation, "for merchandise sold and delivered," the transaction involved having taken place outside the state of Florida. The principal business of Bell in Florida was that of "a merchandise broker for municipal governments and other political subdivisions." It contained no substantial inventory, warehouse or manufacturing facilities. Service of process was upheld upon Bell, the foreign corporation, because the person served was the "head of the corporation," and the service, therefore, came directly within the provisions of sub-section (1) of §47.17 which permits service upon a foreign corporation "upon the

president or vice-president, or other head of the corporation." But the 3rd District Court in Bell took occasion to discuss subsection (5) of said §47.17 which permits valid service to be made upon a foreign corporation "upon any agent transacting business for it in this state," stating that "(t)he test used to determine if service upon an agent is sufficient to constitute service upon a corporation is whether or not, in fact, the corporation will receive notice of the action (citing cases)." In the instant case there is no room for speculation as to whether such test was met, inasmuch as the trial court found as a fact that Evershield Products did "receive notice of the action." The rationale of the "test" set forth in Bell was applied in Confederation of Canada Life Insurance Company v. Vega & Arminan, Fla. 1962, 1944 So. 2d 805, which held inter alia that the corporation would be bound if it had "fair and ample notice of the suit against it," citing Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485.

Deere & Company v. Watts, Fla. App. 1963, 148 So. 2d 529, was a case quite similar in principle to the instant case. There Deere & Company was a Delaware corporation engaged in manufacturing and selling certain farm machinery and John Deere Company of St. Louis was a "jobber or distributor" for Deere & Company in Florida but did business with other franchised dealers in this state. In holding valid the substituted service made in Florida upon Deere & Company, the basic considerations underlying the Deere opinion are the same as hereinbefore mentioned in the instant opinion, principally the quoted language from Berkman v. Anne Lewis Shops, and the all-encompassing preamble to the 1957 amendment to Sec. 47.16 F.S. which was quoted in full there as here.

The late Supreme Court cases of Giannini Controls Corporation v. Eubanks, Fla. 1966, 190 So. 2d 171,

and Illinois Central Railroad Company v. Simari, Fla. 1966, 191 So. 2d 427, and the late 4th District Court case of Bradbery v. Savage, Inc., Fla. App. 1966, 190 So. 2d 183, have not been overlooked and are distinguishable from the case subjudice.

The opinions in all three of these cases held that each case was governed by Zirin v. Pfizer & Co. Inc., supra, namely that it must appear that the foreign corporation was not only "doing business" in Florida but that the cause of action sued upon in Florida "arose out of the activities of the defendant foreign corporation in the State of Florida." In Giannini and Simari, the Court held that the facts did not meet such test and therefore the Florida courts did not acquire jurisdiction over the foreign corporations. while in Bradbery the Court held that the facts did meet the test and that the Florida Court had binding jurisdiction over the nonresident corporation. It is unnecessary here to dwell upon the facts involved in each of the foregoing cases; to do so would unduly extend this opinion. Suffice to say that the facts of the instant case come well within the orbit of the several cases, supra, holding the foreign corporation to be amenable to the Florida Courts through substituted service of process pursuant to the quoted statutes.

The order appealed from must accordingly be, and is, affirmed.

AFFIRMED.

ALLEN, C. J., and LILES, J., CONCUR.

(Case Style Omitted)

ASSIGNMENT OF ERRORS

Comes now Defendant Appellant Defendant, EVERSHIELD PRODUCTS, INC., a Maryland corporation, by and through its undersigned attorneys, and pursuant to Florida Appellate Rules 3.5, assigns as errors upon which it will rely in the appeal of this cause to the Supreme Court of Florida the following:

1. The District Court erred in making and entering its opinion and decision bearing the date and filed in the records of that court on February 10, 1967.

2. The District Court erred in initially construing a controlling provision of the Constitution of the State of Florida, to-wit, Sections 4 and 12 of the Declaration of Rights of the Constitution of Florida, which guarantee the due process of law and equal protection of the law.

3. The District Court erred in initially construing a controlling provision of the Constitution of the United States, to-wit, the XIV Amendment thereof and especially the equal protection clause and the due process clause.

4. The District Court erred in holding that there existed in the records sufficient evidence to sustain the Trial Court's findings of fact, as in the record there is no evidence to support the judgment of the Court.

5. The District Court erred in affirming a holding of the Trial Court wherein the record on appeal shows that the summons was served on a wrong party, which did not bind EVERSHIELD PRODUCTS because said Defendant had no legal notice of the pendency of the proceedings.

Appellant has thereby been deprived of its property contrary to the Florida Statutes and the Florida Constitution and the Constitution of the United States of America.

/s/ William H. Shields

OF COUNSEL,
PAVESE, WALDORF, SHIELDS
& D'ALESSANDRO
Suite 4-G, Lee County Bank Building
P. O. Box 1196
Fort Myers, Florida 33902

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Assignment of Errors has been furnished to DUANE A. REYNOLDS of the firm of HENDERSON, FRANKLIN, STARNES & HOLT, P. O. Box 280, Fort Myers, Florida 33902, Attorneys for Appellees, this 16th day of March, 1967, by United States Mail.

/s/ William H. Shields

DECISION OF SUPREME COURT
OF FLORIDA

Appellees have filed motion to dismiss appeal for lack of jurisdiction; and upon consideration thereof, said said motion is granted and it is ordered that the appeal be and the same is hereby dismissed.

CALDWELL, C. J., THOMAS, ROBERTS and THORNAL, JJ., Concur

DREW, J., dissents

DREW, J., dissenting:

I think this Court's jurisdiction is correctly invoked in this case. The District Court clearly "initially construed" controlling provisions of both the State and Federal Constitutions.

A True Copy

TEST:

/s/ Sid J. White

Clerk Supreme Court

By:

Chief Deputy Clerk

cc: Honorable Joseph E. Gillen
Honorable D. T. Farabee
Messrs. Henderson, Franklin, Starnes & Holt
Messrs. Pavese, Waldorf, Shields & D'Alessandro

PETITION FOR REHEARING

Appellant, EVERSHIELD PRODUCTS, INC., in the above styled cause, respectfully petitions this Court to set aside and withdraw its decision and opinion filed on Friday, September 29, 1967, granting a Motion to Dismiss this appeal for lack of jurisdiction, and thereby affirming the judgment entered by the trial court and affirmed by the District Court of Appeal, Second District, and to rehear this cause on the following grounds:

1. Since a majority of the Court has not been convinced by the briefs and the record that an initial construction of the State and Federal Constitutions has

occurred in the District Court of Appeal, Petitioner asserts that a conflict exists between the case at bar and the case of Zirin vs. Charles Pfizer & Company, 128 So. 2d 594 (Florida. 1961), in that the form of the process in this cause was not in a recognizable form in that the summons was directed to the wrong person, who was not an officer of the Appellant corporation or, in the event the Court found that the letter sent by the adjuster was the notice upon which the process is bottomed, then, in either event, the process was in such form that it was not recognizable to the Appellant as valid, legal process.

2. A conflict exists with reference to the rendering of personal services as opposed to a product. In the application of the constructive service Statutes, under Chapter 47, the original Plaintiffs-Appellees in this cause purchased a personal service job in the form of a coating, the product which was supplied by the Appellant to a subcontractor on the job, not a party to the appeal. Consequently, a conflict between a recent decision and the case at bar is evident in that the Appellees purchased a personal service as opposed to a product.

3. As authority for the two grounds, the Court's attention is directed to Florida Statute 59.45, Pavey vs. Pavey, 112 So. 2d 589 (3rd D. C. A. Florida. 1959).

4. The case at bar is based on the case of Delray Beach Aviation Corp. vs. Mooney Aircraft, Inc., CCA 5, 1964, 332 Fed. 2d 135, which was a case of a Federal Circuit Court of Appeal arising originally in Texas. By adopting this decision as authority for the case at bar, a conflict exists between the law in Florida at the time the case was decided, as no authority existed in Florida on this subject until this time.

5. Petitioner requests the Court to accept the record on appeal and the briefs filed by both parties as a petition for certiorari based on conflict with the cases cited.

THEREFORE, Appellant petitions and prays this Court to reconsider this cause, withdraw its opinion and order, and reconsider this case as conflict certiorari, and to reverse the judgment of the trial court and the District Court of Appeal.

Respectfully submitted.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing has been furnished, by United States Mail, this 4th day of October, 1967, to DUANE A. REYNOLDS of the firm of HENDERSON, FRANKLIN, STARNES & HOLT, P. O. Box 280, Fort Myers, Florida 33902, Attorneys for Appellees.

PAVESE, WALDORF, SHIELDS & D'ALESSANDRO
P. O. Box 1196
Fort Myers, Florida 33902
Attorneys for Appellant

By: William H. Shields

DENIAL OF PETITION FOR HEARING

On consideration of the Petition for Rehearing filed by Attorneys for Appellant,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE
CLERK SUPREME COURT

(I have today mailed to the Clerk of the District Court of Appeal, Second District, Order of September 29, 1967, the above cause)

EXHIBIT "A"

SUMMONS AT LAW
(Original)

J. A. SAPP And D. C. SAPP d/b/a
TICE SUPER MARKET
Complainant

vs.

EVERSHIELD LIQUID TILE OF FLORIDA, INC
EVERSHIELD PRODUCTS, INC and
ROY I. OXENHAM
Defendant

In Circuit Court
Twelfth Judicial Circuit of Florida
Lee County, Florida

Law No. L-939

'63 AUG 12 AM 9:35
DROWARD COUNTY
FLORIDA

RECEIVED
ALLEN B. MICHELL
SHERIFF

THE STATE OF FLORIDA

To the above named Defendant:

EVERSHIELD PRODUCTS, INC

You are hereby summoned and required to serve upon J. A. Franklin, Jr of the law firm of Henderson, Franklin, Starnes, and Holt

plaintiff's attorney, whose address is

P.O. Box 1111, Ft. Myers, Fla.

an answer to the complaint which is herewith served upon you, within 20 days after service of the summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WITNESS my hand and the seal of said Court at Fort Myers, Florida, this August 9, 1963

D. T. FARABEE
As Clerk of said Circuit Court.

(SEAL)

By [signature]
s/Frank Vasiloff
Deputy Clerk

EXHIBIT "A".

EXHIBIT "B"

FORM 57-14-C
FLORIDA SHERIFF'S
FINANCE SYSTEM
This form prepared by and approved by the State Auditor under Section 116.07 Florida Statutes

CORPORATION SERVICE

J. A. SAPP & D. C. SAPP d/b/a TICE SUPER MARKET
PLAINTIFF
vs
EVERSHIELD LIQUID TILE OF FLORIDA, INC.
EVERSHIELD PRODUCTS, INC. & ROY I. OXENHAM
DEFENDANT

CAUSE OF ACTION

SUBPOENS AT LAW
TYPE OF WRIT

CIRCUIT - LEE CO. L939
COURT CASE NUMBER

Henderson, Franklin, et al 42953
2100 Second St. ATTORNEY 10.00 (2)
Ft. Myers, Fla.

ORIGINAL RETURN

Received this writ on the 12th day of August A. D. 19 63, and served same on EVERSHIELD PRODUCTS, INC., a corporation, the within named defendant, in Broward County, Florida at 7:20 P. M. on the 12th day of August A. D. 19 63, by delivering a true copy of the writ with the date and hour of service endorsed thereon by me, and a copy of plaintiff's initial pleading as furnished by the plaintiff, to

George Skadding, President

of said corporation.

ALLEN B. MICHELL, SHERIFF OF BROWARD COUNTY, FLORIDA
BY [signature] D.S.

CIVIL COSTS

SERVICE	$
COPY	$
RETURN	$
MILES	$
	$
TOTAL	$ 5.00
mb	POSTED:

20930

SHERIFF'S RETURN

Received this writ on the _____ day of _____ A. D. 196__ and served the same on _____ the within named defendant at _____ M. on the _____ day of _____, A. D. 196__ in _____, Florida and _____

F I L E D
SEP 5 1963
D. T. FARABEE
CLERK CIRCUIT COURT
BY [signature] D.C.

7 XEROX COPY EXHIBIT "B" XEROX COPY

EXHIBIT "C"

SUMMONS AT LAW
(Original)

J. A. SAPP AND D.C. SAPP d/b/a TICE SUPER MARKET
Complainant

vs.

EVERSHIELD LIQUID TILE OF FLORIDA ~~INC, EVERSHIELD PRODUCTS, INC~~ and ROY I. OXENHAM,
Defendant

In Circuit Court
Twelfth Judicial Circuit of Florida
Lee County, Florida

Law No. L-939

RECEIVED '63 AUG 12 AM 9:35
ALLEN D. MICHELL SHERIFF
BROWARD COUNTY FLORIDA

THE STATE OF FLORIDA

To the above named Defendant:

Eversheild Liquid Tile of Florida, Inc.

You are hereby summoned and required to serve upon J. A. Franklin, Jr of the law firm of Henderson, Franklin, Starnes and Holt

plaintiff's attorney, whose address is

P.O. Box 1111, Ft. Myers, Fla.

an answer to the complaint which is herewith served upon you, within 20 days after service of the summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WITNESS my hand and the seal of said Court at Fort Myers, Florida, this August 9, 1963

D. T. FARABEE
As Clerk of said Circuit Court.

(SEAL)

By Frank Vasiloff Deputy C

EXHIBIT "C" Frank Vasiloff

EXHIBIT "D"

FORM 57-14-C
FLORIDA SHERIFF'S FINANCE SYSTEM
This form prepared and approved by the State Auditor under Section 116.07 Florida Statutes

CORPORATION SERVICE

J. A. SAPP & D. C. SAPP d/b/a TICE
PLAINTIFF SUPER MARKET
vs
EVERSHIELD LIQUID TILE OF FLORIDA, INC.
EVERSHIELD PRODUCTS, INC. & ROY I.
DEFENDANT OXENHAM

CAUSE OF ACTION

SUMMONS AT LAW
TYPE OF WRIT

CIRCUIT - LEE CO. L939
COURT CASE NUMBER

Henderson, Franklin, et al 42953 10.00
Fort Myers ATTORNEY (2)

ORIGINAL RETURN

Received this writ on the 12th day of August A D 19 63, and served same on EVERSHIELD LIQUID TILE OF FLORIDA, INC., a corporation, the within named defendant, in Broward County, Florida at 7:21 P. M. on the 12th day of August A. D. 19 63, by delivering a true copy of the writ with the date and hour of service endorsed thereon by me, and a copy of plaintiff's initial pleading as furnished by the plaintiff, to

George Skadding, President

of said corporation.

ALLEN B MICHELL SHERIFF OF
BROWARD COUNTY, FLORIDA
BY [signature] D.S.

CIVIL COSTS

SERVICE	$
COPY	$
RETURN	$
MILES	$
	$
TOTAL	$ 5.00
mb	POSTED:

20929

SHERIFF'S RETURN

Received this writ on the _____ day of _____ A. D. 196__ and served the same on _____ the within named defendant at _____ M. on the _____ day of _____, A. D. 196__ in _____, Florida and _____

FILED
SEP 5 1963
D. T. FARABEE
CLERK CIRCUIT COURT
BY [signature] D. C.

5 EXHIBIT "D".

(T. 1) TRANSCRIPT OF TESTIMONY

Case No. L-939

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA.

* * * * * * * *

(T. 4) PROCEEDINGS

(Mr. Shields) Your Honor, we are appearing on behalf of Evershield Products, Inc. under a motion filed to vacate a judgment on the basis that the Defendant Evershield Products, Inc. was not served with process in the cause and the cause proceeded to judgment and a verdict of a jury was rendered in the amount of $12,545.

We are ready to introduce our evidence.

(The Court) All right. Mr. Reynolds, are you ready to proceed?

(Mr. Reynolds) Yes, sir.

(Mr. Shields) Do you want the rule invoked?

(Mr. Reynolds) No, sir.

PAUL J. PETRIK,

a witness, called and duly sworn for and in behalf of the Petitioner, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Shields:

Q. Would you state your full name to the Court?
A. Paul J. Petrik, Evershield Products, Inc., Incorporated, Joppa, Maryland.

Q. Are you an officer of that corporation? A. Yes, I am.

(T. 5) Q. What office do you hold? A. President.

Q. Is it incorporated under the laws of what state? A. Maryland.

Q. Who are the officers and directors of this Maryland Corporation? A. I'm President, Mr. Edward Rohm is the Treasurer -- Secretary, excuse me, and my wife, Margaret Petrik is the Treasurer of the company. And the directors are the same.

Q. I notice in the papers some difference in the spelling of your name. Could you explain that? A. Well, it's going to bug me for a while. We recently had our name changed from Petrlik to Petrik. It was originally P-e-t-r-l-i-k and it is now P-e-t-r-i-k, just a change for phonetic purposes and it was difficult to pronounce and the kids were having trouble in school and so forth.

Q. Is the corporation authorized to do business in Florida? A. No; we manufacture products which we supply to applicators throughout the world. Actually, these applicators are customers who purchase the materials and sell it in their respective areas.

Q. Does your company maintain a jobber or salesman in Florida? (T. 6) A. No. The only thing we have had in Florida was Evershield Liquid Tile of Florida which was an applicator acting independently and working independently. We treated them as a normal customer on our books and the materials we sold were typical accounts receivable.

Q. And the name of that company was Evershield Liquid Tile of Florida, Inc.? A. That's right.

Q. Mr. George Skadding who was -- . Does your Maryland corporation have a resident agent in Florida for the service of process? A. No, we do not.

Q. Are you acquainted with Mr. George Skadding? A. Yes, I am.

Q. Was he ever an agent or a representative of your Maryland company? A. No, he was not.

Q. When the process was served in this particular case, did Mr. Skadding advise you that he had been served in Florida as your agent? A. No, he did not.

Q. Did you know about the suit being filed or have an opportunity to defend this suit in Florida? A. We didn't have an opportunity to defend it. We knew there was going to be a suit but we knew we would have (T.7) had to have been served if we were named as a defendant, I guess you would call it. To our understanding, there was a suit against Liquid Tile of Florida and that was what we knew about. But we had never been formally served on it.

Q. Did you receive a notice from Mr. Franklin who was a lawyer in this case? A. We received a notice that there was going to be a trial on a certain date. Merely a notice. It wasn't any summons or subpoena.

Q. You didn't receive a summons or a copy of the Complaint? A. No, we did not.

(Mr. Shields) You may ask him.

CROSS EXAMINATION

By Mr. Reynolds:

Q. Mr. Petrik, have you ever received a copy of the summons and Complaint in this cause? A. No, we have not.

Q. To your knowledge, has anyone connected with Evershield Products, Inc. received a copy of the summons and Complaint in this cause? A. No.

Q. Do you know a man named Harry Harris? A. Yes, I do.

Q. Is he connected with Evershield Products, Inc.? (T.8) A. No, he is not.

Q. Has he ever been connected with Evershield Products, Inc.? A. Not with Evershield Products, Inc., never.

Q. Was George Skadding ever connected with Evershield Products? A. Not with Evershield Products, Inc.

Q. What year was Evershield Products, Inc., incorporated? A. 1954.

Q. Has it always been known by that name? A. Again, we had a name changed. It used to be E-v dash R dash S-h-i-e-l-d. And I think in 1956 it was changed to straight Evershield. In other words, the same pronunciation but we eliminated the dashes to make it again more phonetic.

Q. Since 1956 it could be known then as Evershield Products, Inc., is that correct? A. That's right.

Q. Do you know a lady named Betty Jane Bragg? A. Betty Jane Bragg? That name is familiar. Bragg. I know the name but I honestly cannot place it right now, so if you will refresh my memory --.

Q. Was she a secretary in your office in Joppa, Maryland? (T.9) A. Oh, yes; she was a typist, secretary. Is that right. No, wait a minute. Excuse me. I'm still -- I know the name but I still can't --. We had a Betty as a secretary quite some years ago.

Bragg. I honestly don't know. I know I know the name but I honestly can't place her at this moment.

Q. What type of business is Evershield Products? A. Evershield Products, Inc. is in the business of formulating polyester resinous materials for specific industrial uses. We manufacture industrial products used in boat laminations, we manufacture primarily -- our primary product is an architectural coating product known as Liquid Tile; and other industrials.

Q. Is it my understanding that you sell this Liquid Tile to Evershield Liquid Tile of Florida, Inc.? A. We sell to them, yes, as we do many customers.

Q. Do you supply them with advertising literature? A. Yes, we do.

Q. Do you send representatives down to help them sell the product? A. We do this with everyone. We occasionally - maybe once a year - make field calls to all of our applicators and give them whatever sales assistance they may require and make architectural calls with them and bring them up to date on new application techniques.

(T.10) Q. Does your company pay for any of the advertising of Evershield Liquid Tile of Florida, Inc.? A. No, we do not.

Q. You don't share in the advertising expense in any way? A. No. The only thing is that we have a program with all of our applicators which is a national program whereas they purchase the advertising media from us and we sell to them at half the cost that we pay for it. And they then, all customers, receive a one percent advertising allowance predicated on their sales to be applied against this.

So in essence they are buying the literature but they are getting it in accordance with their sales, they can get rebates for it, which is standard procedure.

Q. Would it be fair to say that Evershield Liquid Tile of Florida, Inc. serves as a jobber of Evershield Products in selling this Liquid Tile product? A. No. As far as I know of, they have no customer jobbers, for many applicators to ship materials to adjacent applicators for a matter of expediency, although most of our sales are made directly to the applicator doing the installation.

Q. Do you have personal knowledge as to the type of (T. 11) business of Evershield Liquid Tile of Florida, Inc., what the business consists of? A. I know that they were applying Liquid Tile and they were painting and they were acting as a typical coatings contractor.

Q. Does your company have a contract with this company? A. Do we have a contract with them?

Q. Yes, sir, to supply Liquid Tile? A. We have contracts with all of our applicators, either written or in some instances just sort of a handshake agreement, which are standard contracts.

Q. Was this a written agreement or a handshake agreement? A. I honestly don't know. I do know we do have a contract with Mr. Roy Oxenham. I don't know if Liquid Tile of Florida has a written agreement or not. We haven't been able to find anything written in the file. But all of the applicators that do business with us work on the same identical principle whereas they are applicators to apply our materials in their respective areas and they are responsible for sales and service of the materials in the area.

Q. Of the product? A. Of the product, when they install it they are (T. 12) responsible to see that it's installed properly and to take care of the customers.

Q. And do these companies that sell your product hold themselves out as being a representative or distributor in any way of Evershield Products, Inc.? A. Absolutely not. Excuse me --.

Q. Your testimony, I believe, sir, was that you did have a written contract with Mr. Roy Oxenham. Is that correct? A. Yes, we do.

Q. Is he likewise, for lack of a better word, a distributor or seller of this product on behalf of Evershield Products, Inc.? A. I don't particularly agree with your connotation. It's not distributor, it's not seller. It's applicator, what we pointed out before.

If you will excuse me, I have now refreshed my memory on Betty Bragg. Betty Bragg is an employee, a girl that works in the plant and she packages materials and also packages literature and sends it out. I'm sorry I acted so stupid but I couldn't place the name with the person.

Q. Have you ever received a letter from anyone enclosing a copy of the summons and Complaint in this case? A. No, we have not.

Q. I hand you here a copy of a letter and ask you if (T. 13) you have ever seen such a letter?

(Document handed to the witness. Read silently by the witness.)

A. Yes, I have seen this. This is a letter that was written to us and which I called Mr. Harris about. It's not a summons. It's stating that they were unhappy with the aspects of an installation over which we had no control. And I immediately called Mr. Harris and discussed it with him as to what could be possibly wrong.

Q. But you have then seen this letter before, sir? A. Yes, I have.

Q. When, sir? A. Now, I can't honestly say. I know that I received two or three letters in respect to this and I received several 'phone calls and made many 'phone calls in respect to this job.

Q. Do you remember if there were any enclosures in this letter? A. No. The only -- if you would want to call it a formal or legal document that I have seen, it was the notice of trial which we had been sent a copy of which we -- there was a notice. That wasn't a summons. And we were waiting.

When I received that I likewise called Harry and asked if there was anything we could do, that if necessary we would come down. At that time there was nothing that I (T. 14) could do that he hadn't already done. And I said, "If we receive a summons or if we are summoned, we will be glad to testify in your behalf."

(Document handed to the witness.)

(Mr. Shields) Your Honor, I want to enter my objection at this time to the letter. This has nothing to do with process in the case.

(Argument off the record.)

(The Court) I will reserve ruling on your objection.

(Mr. Reynolds) I will ask you to mark this as Plaintiff's Exhibit 1.

(Carbon copy of letter dated September 11, 1963 marked Plaintiff's Exhibit 1.)

Q. Mr. Petrik, do you know whether or not this letter marked as Plaintiff's Exhibit Number 1 was sent by registered or certified mail? A. I don't remember.

Q. I hand you here for the sake of saving time four instruments and ask you if you have ever seen these particular instruments before or others similar and can identify them, sir? A. Yes, I have. This particular brochure is one which we had -- oh, gosh, eight or ten years ago -- eight years ago. We have subsequently up-dated it and have other (T. 15) brochures now, which this is passe'.

Likewise with the color card. Our applicators are accustomed to mixing colors in the field. We don't circulate these. These are available for their guidance only. This is a typical mailer. Not typical, because this is the first time we ever used a photograph of a woman in our mailers in 13 years of mailing. And it indicates an unusual aspect and unusual type of application.

Q. Would it be fair to say that these documents are pieces of advertising material that you have supplied to your applicators? A. Our applicators buy that literature.

Q. Is it your testimony that none of this literature is supplied to applicators free of charge? A. Maybe insignificant amounts for an applicator getting started or if he comes up and wants a couple of copies of testimonials or lab reports or whatnot, we wouldn't charge him. It wouldn't be feasible to bill a man for three pieces of literature. But when he buys for his mailing and his general architectural sales, he buys the literature.

Q. These advertising materials are supplied by your company? A. Absolutely.

Q. And are supplied either free or for a consideration to your applicators, is that correct? (T.16) A. True.

(Mr. Reynolds) Mark these as Plaintiff's Exhibit Number 2 for identification only.

(Mr. Shields) Your Honor, I object. I don't think it has anything to do with the case.

(The Court) He can mark anything he wants to for identification.

(Discussion off the record.)

(Composite exhibit consisting of four pieces marked for identification Plaintiff's Exhibit 2.)

Q. Was it your testimony that George Skadding has never been connected with Evershield Products?
A. That's true.

Q. Was he ever a stockholder? A. No.

Q. Was he ever an officer? A. No.

Q. Was he ever a director? A. No.

Q. Was he ever an employee? A. No.

Q. Was he ever an agent? A. No.

Q. Was he ever a director? (T. 17) A. No.

(Mr. Reynolds) No further questions.

REDIRECT EXAMINATION

By Mr. Shields:

Q. Mr. Petrik, I gather from what you said earlier that these materials which your company manufactures and sells are specialized materials? A. Very much so.

Q. And you keep referring to these people who apply this as applicators? A. Right.

Q. Are these people especially trained by your company? A. Yes. In most instances they are either painting contractors or other specialists like specialist floor applicators who we train in the application of polyesters; and then they act as applicators in the area.

Q. Does the Maryland corporation then license or authorize these applicators as being trained in this field? A. They are trained applicators, that's what we call them.

Q. This Florida corporation, was it authorized to train and license applicators in these products? A. No, it was like any applicator. And I don't want to mislead

anyone. Any applicator that we have has a (T.18) prerogative of expanding his territory, of taking in sub-applicators if it wants to, particularly on remote jobs in which instance they then can sell to another individual. They can give him technical field assistance and do what is necessary to expedite the proper installation of material. But again, this is an overall thing and it's so stated in all of our contracts.

(Mr. Shields) That's all.

(T.19) EDWARD ROHM,

a witness, called and duly sworn for and in behalf of the Petitioner, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Shields:

Q. Give the Court and the Reporter your name and address. A. Edward Rohm, R-o-h-m.

Q. Where do you live? A. Perry Hall, Maryland. Do you want a mailing address?

Q. No, that's fine. Are you connected with Evershield Products, Inc.? A. Yes, I am.

Q. What relation do you have? A. I'm Secretary of the corporation, a member of the Board and also acting claims manager.

Q. As Secretary are you the custodian of the records of the company? A. I am.

Q. Have you checked the records to ascertain if Mr. George Skadding is a director or officer or agent in the employ of the company? A. I have.

(T.20) Q. And is he? A. He is not.

Q. The statement that Mr. Petrik made about not being authorized to do business or not having a resident agent here or broker or jobber or distributor, are they true? A. You mean in the State of Florida?

Q. In the State of Florida? A. He had applicators only in the State of Florida.

Q. Is there any corporate connection between Evershield Products, Inc. and Evershield Liquid Tile of Florida, Incorporated? A. As of when?

Q. At any time. Are there joint officers and directors of the companies? A. No.

Q. No corporate relationship between them at all? A. No. I might say that Mr. Petrik or Petrlik was at one time President of Evershield Liquid Products of Florida.

Q. Do you recall when that was? A. It would be 1959, in that time.

Q. Does your company have accounts and they carry them on their books as a customer? A. As a customer, as an account receivable.

(Mr. Shields) Okay.

(T.21) CROSS EXAMINATION

By Mr. Reynolds:

Q. Do you know for what period of time Mr. Petrik was the President of the Florida Liquid Tile, Inc. Company? A. No, I don't.

Q. Do you know whether he was the President during the year 1963? A. No, I couldn't answer that.

Q. Do you know whether or not he has any financial interest in this company? A. Financial interest?

Q. Yes, sir. A. By that -- ?

Q. Is he a stockholder? A. No.

Q. Has he loaned any money to the corporation? A. No. I don't like to answer personal questions, if you follow me.

(Mr. Reynolds) No further questions.

(Mr. Shields) Thank you. Come down.

(T.22) GEORGE SKADDING,

a witness, called and duly sworn for and in behalf of the Petitioner, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Shields:

Q. Your name is Mr. George Skadding? A. George Skadding.

Q. Where do you live? A. 5180 Northeast 18th Terrace, Fort Lauderdale.

Q. Are you acquainted with a company known as Evershield Liquid Tile of Florida, Inc.? A. Yes.

Q. Are you associated with that company? A. Yes, I was.

Q. Were you there when it was organized? A. Yes.

Q. Do you recall when this occurred? A. I think it was 1959.

Q. Do you recall now who organized the company? A. Well, yes; it was a group, Mr. Petrik and myself, and I think that's all that was involved in it.

Q. Where did it maintain an office? A. In Fort Lauderdale.

Q. Was this company an authorized applicator of this (T.23) Evershield Products, Inc.? A. We were an authorized applicator, yes.

Q. How long did you work for the company? A. I worked for them until '60 or '61. I think I stepped out in 1960 but was still associated until early 1961.

Q. Was there any corporate connection between the two companies? A. None that I know of.

Q. Did you all just buy the products of Evershield Products, Inc.? A. That's correct.

Q. Did Mr. Petrik come down and aid you in the application of these products? A. Yes; when we had problems. Not problems, I wouldn't say, but new techniques or a specialized job come up, Mr. Petrik came down as an agent for -- like a salesman from a products company, and would assist us.

Q. Did he go with you to call on architects and the like? A. I think it happened once. Twice. We had little meetings with architects, yeah, principally to show the product, what it would do.

Q. I see. Were you ever an employee or an agent or an officer of this Evershield Products, Inc., this Maryland (T.24) corporation? A. Never.

Q. You were the one I believe who was served with the Complaint and the summons in this case? A. Yes.

Q. Were you still connected with this Evershield Tile of Florida, Inc. then? A. No, I was not.

Q. What did you do with the papers when they were served on you? A. I called up Mr. Harris who was a superintendent, official, running the organization, and he came over. He got the papers and said he would take care of it.

Q. Did you ever notify the office in Maryland? A. No, I left that up to Harris.

Q. Did you notify counsel for the Plaintiff, Mr. Sapp, that filed the suit? Did you send him a letter? A. Yes, I think I did. I have a copy of the letter. But I'm sure I did.

Q. What was the content of the letter. A. The contact (sic) of the letter was stating that I was no longer connected with Evershield Liquid Tile of Florida.

Q. Did you mention anything about the Maryland corporation? (T.25) A. No, I didn't. I don't recall that. I might have said that the products were produced by the Maryland corporation. But that's all I remember.

Q. But you were not the resident agent for the Maryland corporation? A. I was not.

Q. And had no relationship to them whatsoever? A. No; only as an applicator.

Q. Did you write at that time to the Secretary of State in Florida. A. Yes; after I received the summons, why, I was told to, that I should have my name taken off the corporate roster and it had never been done. So I wrote to the Secretary of State and requested the same.

Q. That was with reference to the Florida company? A. That's correct.

Q. Mr. Rohm indicated that Mr. Petrik was carried as an officer of this Florida company. How did that happen? A. Well, when we organized the company Mr. Petrik helped us organize it and he was the President of the organization.

Q. Did he own any stock in it? A. It wasn't set up as a stock. It was all to be renegotiated later on. He sort of -- just helping the company, you might say.

(T.26) Q. I see. Was the Florida corporation in debt to the Maryland company? A. Well, we owed them for products, yes.

Q. Was it a big debt ? A. Beg pardon.

Q. How much money was involved? A. I don't remember that. It wasn't too great a sum.

Q. Well, did Mr. Petrik know he was an officer down here in Florida? A. Sure.

Q. Did he attend annual meetings of the stockholders or directors, quarterly meetings, anything like that? A. Once I think Paul did. I don't remember whether he attended them or not. I don't think so.

Q. Who managed the company here in Florida? A. I did up until the time I resigned.

Q. When you left who took over the company? A. Mr. Harry Harris.

(Mr. Shields) You may ask him.

CROSS EXAMINATION

By Mr. Reynolds:

Q. Whose idea was it to form the Florida corporation? A. Gee, I don't know how that came about. I think it all came about through work and through credits and things of that sort. But I don't recall that.

(T.27) Q. From your testimony I presume that you and Mr. Petrik had at some time decided to form the corporation and go into business in the State of Florida? Is that correct? A. That's correct.

Q. The purpose of forming the corporation was to sell this product manufactured by Evershield Products, Inc. ? A. No, it was formed for the purpose of only being an applicator and applying it to jobs.

Q. Didn't the company also sell the product? A. No, they only supplied us with a product to work out. They didn't sell the product to anyone else.

Q. Evershield Liquid Tile of Florida, Inc. did more then apply the product, did it not? A. No, that's all. We were official applicators.

Q. Is it your testimony that if I wanted some of this product applied at my home that I would buy the product from the Maryland corporation and the Florida corporation would then apply it? A. We would apply it, yes, sir.

Q. From whom would I buy the material? A. You didn't buy the material. You bought the job. We as applicators applied it.

Q. So then the Maryland corporation would sell the material to the Florida corporation, is that correct, sir? A. That's right.

(T.28) Q. And the Florida corporation would then contract to do the job? A. That's right.

Q. Using the product supplied by the Maryland corporation? A. That's correct.

Q. At the time you were served with a copy of the summons in this cause were you designated as the President of Evershield Liquid Tile of Florida, Inc.? A. I think it's designated -- .

(The Court) By whom? I do not understand the question. You mean in the summons?

(Mr. Reynolds) Yes, sir.

(The Court) Well, that is in the record. I take notice of what he was designated in the summons, as President.

Q. At the time you were served with a copy of the summons and the Complaint, were you designated on the

corporate records in the Secretary of State's office in Tallahassee as being the President of Evershield Liquid Tile of Florida, Inc.? A. I think it was Vice-President.

Q. But you were designated as an officer of the company? A. Yes, sir.

(T.29) (Mr. Reynolds) No further questions.

REDIRECT EXAMINATION

By Mr. Shields:

Q. Did this Evershield Liquid Tile of Florida do other kinds of work like painting, caulking or just applying this particular product? A. Our main product was the application of Liquid Tile. We did some small other jobs, which was a combination, what was called for, caulking windows, things like that. We did that mostly to have the proper application.

(Mr. Shields) No further questions.

(T.30) HARRY H. HARRIS,

a witness, called and duly sworn for and in behalf of the Petitioner, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Shields:

Q. Would you state your name to the Court, please? A. Harry H. Harris, 3431 Southwest 19th Street, Fort Lauderdale.

Q. Were you associated with Evershield Liquid Tile of Florida? A. Yes, sir, I have been.

Q. I was referring back to 1963. At that time were you? A. Yes, sir.

Q. In what relationship did you work with them? A. I was managing Evershield Liquid Tile of Florida. I don't know positive whether I was carried on the roster of officers.

Q. Whom did you take over the management from? A. Mr. Skadding.

Q. Do you recall when that happened? A. Pardon?

Q. Do you recall when that happened? A. To the best of my knowledge, it was the 1st of (T.31) October in either '60 or '61. I believe '61.

Q. And when did you stop working for Evershield Liquid Tile of Florida? A. Approximately two years ago this May, this past May.

Q. Well, during the time that you were there was Mr. Skadding related in any way to Evershield Products, Inc.? A. Not that I know of.

Q. Your company continued to be an applicator for Evershield Products, Inc.? A. Yes, sir.

Q. Did you receive some papers in this suit from Mr. Skadding? A. Yes, I did. He called me and stated that he had been served with papers on Tice Super Market. I went to his house, picked up the papers and got in touch with my insurance company.

Q. Did you know that Evershield Products, Inc. had been sued at the same time? Were you aware of that? A. No, sir, I didn't.

Q. Did Mr. Skadding give you all the papers he had at that time? A. I would assume so. It was the one envelope that had the Complaint in it.

Q. Was there a summons or a Complaint for Evershield (T.32) Products in the envelope? A. Not to my

knowledge. I think there was just one copy of the papers.

Q. What insurance company did you talk to about it? A. Travelers.

Q. Travelers Insurance? A. (Nodded affirmatively.)

Q. Did they defend the suit for you? A. No, they didn't.

Q. They investigated it and sent me a letter and said they had no defense.

Q. So they didn't undertake to defend the lawsuit at all? A. No, sir.

(Mr. Shields) Thank you.

CROSS EXAMINATION

By Mr. Reynolds:

Q. Mr. Harris, did you have a financial interest in Evershield Liquid Tile of Florida? A. Financial interest?

Q. Yes, sir. A. No, sir; other than my livelihood.

Q. You were an employee of the company then, sir? (T.33) A. Yes, sir.

Q. You didn't hold any stock in the company? A. Well, there was a sales agreement which was initiated in I believe July of '61 or '2, '62, and in which I was going to purchase the stock.

Q. Who hired you, sir? A. Who hired me?

Q. Yes, sir. A. Mr. Skadding and Mr. Newman.

Q. Who is Mr. Newman, sir? A. At that time he was acting I believe as sales manager for Evershield.

Q. Evershield Liquid Tile of Florida? A. (Nodded affirmatively.)

Q. Then when Mr. Skadding left the company you took over as manger, is that correct? A. Yes, sir.

Q. Did you examine the contents of the envelope that was delivered to you by Mr. Skadding? A. Well, I read the petition that was in it, yes, sir.

Q. Did you advise anyone with Evershield Products, Inc. of the contents of the envelope? A. To the best of my knowledge we had had several conversations concerning this job and specifically at the (T.34) time when these papers were served that I delivered them to the insurance company. I can't recall any specific conversation other than we were going to be sued or --.

Q. Did you ever advise Evershield Products, Inc. that they had been sued? A. No, sir, not to my knowledge.

Q. I hand you here a letter designated as Plaintiff's Exhibit 1 and ask you if you have ever seen the original of that letter, sir? A. Yes, sir, I received a copy of this letter.

Q. Were there any enclosures with the letter, sir? A. Yes; the papers that I picked up from Mr. Skadding was in it, I believe.

Q. A copy of the Complaint? A. Yes.

Q. And summons? Is that correct, sir? A. (Nodded affirmatively.)

Q. I hand you here a piece of paper and ask you to identify it? A. Yes; that letter came to me by certified mail to the house, certified or registered. My wife signed for it. It was waiting for me one night when I got home.

(Mr. Reynolds) Mark this as Plaintiff's Exhibit Number 3, please.

(Registered mail receipt marked for (T.35) identification as Plaintiff's Exhibit Number 3.)

No further questions.

(Mr. Shields) That's all.

ROY I. OXENHAM,

a witness, called and duly sworn for and in behalf of the Petitioner, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Shields:

Q. Your name is Mr. Roy Oxenham? A. Roy I. Oxenham, 4271 Lagg Avenue.

Q. Here in Fort Myers? A. That's right.

Q. Were you the person who sold this Tice Super Market that the Court has under investigation today? A. No, I didn't. I introduced Mr. Harris to the architect and then he took over from there.

Q. Are you an applicator for this area in Southwest Florida? A. I was. I can't remember the date that it started.

Q. During 1963? A. Yes.

Q. Who performed the work on this particular job? A. Mr. Harris.

(T.36) Q. And he was an employee of Evershield Liquid Tile of Florida, Inc.,? A. That's right.

CROSS EXAMINATION

By Mr. Reynolds:

Q. Mr. Oxenham, were you served with a copy of the Complaint and summons in this cause, sir?

A. Originally I was. And then I was exonerated in the case.

Q. Did you have a contract with Evershield Products, Inc. at the time you were served a copy of the Complaint and summons? A. Yes, I did.

Q. Was this a written or oral contract? A. It was a written contract but I never received the agreement back. I was an applicator of the smaller jobs.

Q. Would you define for me, sir, what you mean by an applicator? A. I bought the material from Evershield Products and applied it to their specifications on the work that I had secured myself.

(Mr. Reynolds) No further questions.

(The Court) Mr. Oxenham, this material, is this the kind of material that you prepare a (T. 37) surface for and then add a bulk of material, a quantity of it to that, you add some sort of catalyst or hardener?

(The Witness) Yes, sir.

(The Court) Then you put it on?

(The Witness) That's right; on the jobs that I did myself. This job was larger than I was able to take care of and I contacted Mr. Harris and he made the contract with the contractor that was doing the job to the specifications of the architect.

(The Court) All right, sir.

(Mr. Shields) That's all. Thank you very much.

We rest, your Honor.

(Mr. Reynolds) At the outset, Plaintiff offers as Exhibits 1, 2 and 3 the instruments which have previously been identified.

(Mr. Shields) We make our objection on the basis of immateriality. They are not related to any legal process or the Complaint in this cause.

(The Court) Are you trying to show actual knowledge?

(Mr. Reynolds) Yes, sir.

(The Court) All right. Overruled.

(T.38) (Carbon copy of letter dated September 11, 1963, Composite Exhibit consisting of four pieces and registered mail receipt received in evidence and marked Plaintiff's Exhibits 1, 2 and 3 respectively.)

CHESTER E. TOZZIE,

a witness, called and duly sworn for and in behalf of the Respondent, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Reynolds:

Q. Mr. Tozzie, state your full name and address. A. Chester E. Tozzie, T-o-z-z-i-e; 3768 Northeast 19th Avenue, Fort Lauderdale.

Q. What is your occupation? A. I'm a District Adjuster with the Travelers Insurance Company.

Q. Are you familiar with the case J. A. Sapp and D. C. Sapp, doing business as Tice Super Market versus Evershield Liquid Tile of Florida, Inc. and Evershield Products, Inc. and Roy I. Oxenham? A. As it pertains to the Evershield Liquid Tile Company, yes, sir.

Q. Did the Travelers Company have insurance for Evershield Liquid Tile? A. We had a liability contract with that firm, yes, sir.

(T.39) (The Court) I might say that the file shows that Mr. Oxenham was dismissed as a Defendant somewhere during the course of the suit.

(Mr. Reynolds) Yes, sir.

Q. Did you discuss this case with any employee or agent of Evershield Liquid Tile of Florida, Inc.? A. Yes, sir.

Q. With whom did you discuss this case? A. Mr. Harris.

Q. That's the gentleman who testified here? A. The gentleman who testified, Harry Harris, yes.

Q. Did he deliver you a copy of the summons and Complaint, sir? A. Yes, sir, he did.

Q. Did Mr. Harris advise you whether or not he had contacted anyone with Evershield Products, Inc. concerning this case? A. No, sir, he did not.

Q. Did you know that Evershield Products, Inc. was involved in the case? A. I believe their name was on the lawsuit, yes, sir, or on the summons and Complaint.

Q. Have you had any correspondence with either Evershield Liquid Tile of Florida, Inc. and/or Evershield Products, Inc.? (T.40) A. I wrote Mr. Harris a letter which was previously introduced, and a carbon copy to Evershield Products in Maryland, returning the summons and Complaint delivered to us as they were not covered under the policy.

Q. I hand you here a copy of Plaintiff's Exhibit 1 and ask you if that is the letter you wrote to Mr. Harris with a copy of it to Evershield Products, Inc.? A. Yes, that's a carbon copy of it.

Q. Now, the letter states that a copy of the summons and Complaint were being sent to the addressee, is that correct, sir? A. Yes, sir.

Q. Was in fact a copy of the summons and Complaint mailed to these two companies? A. Yes, sir.

Q. I hand you here a piece of paper and ask you if you can identify it? A. Yes, sir; that is a signed return receipt request on registered letter which we sent to Evershield Liquid Products in Joppa, Maryland with a copy of that letter which you previously showed me, with a copy of the summons and Complaint.

Q. And was that signed and returned to you? A. Yes, sir; signed by Betty Jane Bragg. Our date stamp is September, 1963, which is when it was returned to (T. 41) us.

(Mr. Shields) September when?

(The Witness) 19.

(Mr. Reynolds) We offer this as Plaintiff's Exhibit Number 4.

(Return receipt received in evidence and marked Plaintiff's Exhibit 4.)

No further questions.

CROSS EXAMINATION

By Mr. Shields:

Q. Mr. Tozzie, did you check the Court file on this particular claim? A. You mean the Court in Fort Myers?

Q. Yes. A. No, sir, I did not.

Q. You didn't know they were defaulted on September 24? A. No, sir, not of my own knowledge, no, sir.

Q. Were you advised that these Defendants were? A. Subsequently, yes, sir.

Q. You say that what you sent to Maryland was a copy of the letter? A. Well, it's a duplicate of that letter. It's a carbon copy, sir, a copy sheet with the

notice on the bottom of that letter showing a carbon copy to Mr. Franklin, (T.42) Jr. and Mr. Petrik.

Q. Do you know whether or not you sent two carbon copies or just one? It doesn't show that copies were sent to each party. A. That would be one copy to each party, sir.

Q. Was there any summons and Complaint sent to the Maryland address? A. Yes, sir.

Q. Did you have copies made of the Complaint or were they supplied to you? A. No; I made photocopies of them and returned the originals to Mr. Harris and the carbon copy I sent to the Maryland corporation - I believe it was Joppa, Maryland - and a carbon copy I kept for my own records or -- a photostatic copy, I'm sorry.

Q. Do you know what date it was mailed? A. The date on the letter. I can't see that from here. It would be September 11.

Q. Did you receive any acknowledgment from the Maryland corporation that they received it other than this return receipt? A. No, sir, that's all I received.

Q. You didn't know any of these people up there? A. No, sir; only by the name that is on that letter, that's all, Mr. Petrlik.

(T.43) Q. And your company purported to have this contract only with Evershield Liquid Tile of Florida, is that correct? A. That's the way the policy is written, yes, sir.

Q. And your company had no relationship to the Maryland corporation whatsoever? A. No, sir.

Q. You were just being nice and mailing them these copies? Is that the purpose of it? A. That's a matter of business that we do that, sir.

(Mr. Shields) That's all.

(Mr. Reynolds) No questions.

The Plaintiffs ask the Court to take judicial notice of the Notice of Trial on Damages that was served in this cause bearing the file date of November 20, 1964, and a proper certificate of service by Mr. James A. Franklin, Jr. of our law firm.

(Mr. Shields) We have no objection, Your Honor.

We would like to recall Mr. Petrlik.

(Mr. Reynolds) We rest.

(T.44) PAUL J. PETRIK,

a witness, recalled for and in behalf of the Petitioner, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Shields:

Q. Mr. Petrik, let me show you these two exhibits introduced by Mr. Tozzie. Did these ever come to you or your company? A. As I said previously, I recall seeing this letter but I never saw a summons. And this type of correspondence would have gone through Mr. Rohm before it got to me. And we discussed this. We had never seen this summons. No summons was sent with this letter.

Q. But you did get the letter? A. To the best of my knowledge, yes.

Q. Did your company have insurance too? A. Yes, we did.

Q. What company was it with? A. American.

Q. It wasn't Travelers? A. No.

Q. Do you know whether or not your carrier purported to act for you in this matter? A. We had no opportunity to notify him to act. We (T.45) didn't know what was going on. We had never been served, never been legally processed.

Q. It was mentioned earlier in the testimony that you were an officer in this Evershield Liquid Tile of Florida, Inc. Would you explain to the Court those circumstances? A. Yes, I'd like to because I think this clouded the issue a little bit. Although it wasn't pertinent to the actual proceeding going on here, I think an explanation is due to the Court.

In 1957 the Liquid Tile Corporation of Florida was formed by a Mr. George Winston and George Skadding and a Milo Newman. And at that time they were our applicators and doing a fine job.

Unfortunately, Mr. Winston - who was the administrator behind the whole thing - had some financial reverses and at that time Liquid Tile of Florida wanted to continue in business and, of course, we were willing and most anxious to help them as we would actually anyone. They asked me to come down and see if there was anything we could do, because they were considerably past due with their account receivable. And I said, "Well, no." I mean, we'd go along as far as we could go. And their accounts were considerably past due and we are not in the application business.

(T.46) They then asked if -- they had several jobs for us coming, one which they had contractual commitments, and asked if we would extend credit to them to permit them to take on these jobs and they would pay us back after that. At the advice of counsel, the following agreement was made whereas they took the stock of

George Winston and the stock of the company and on the face of the stock assigned it to me as collateral for materials advanced on this specific job. So therefore, I was the holder of the stock. But we had never had the stock transferred to our name in the State Department nor had ever acted on it. And this became a rather ticklish situation then because basically we had stock certificates that were endorsed over to us that we had never done anything with. They still continued to operate as an independent company as they had been. I had exercised no control over it and didn't mean to, didn't try to and didn't.

Q. This was to secure their account with Evershield Products, Inc.? A. Yes, yes; because they were in to us for well over $30,000 which we subsequently lost.

Q. How long did this continue? A. This continued for quite a few years because we were trying to get them to help themselves out of this dilemma and see if they could, you know, recoup and be a (T.47) continuing customer.

What had happened, and which further proves this - not proves, but to illustrate the relationship between Evershield of Florida and Evershield Liquid Tile - the income tax people noticed a substantial loss on our books and went after us on a capital loss situation whereas they were claiming that we were taking an ordinary loss and in effect it was a capital loss.

When this went to the Appellate Court just recently and when the evidence was presented, particularly the stock certificates, where it was noted on the face of these that these were only collateral and we treated these people as customers, there was no special concession or anything like that, it was ruled in our favor that they were in fact only customers and the stock certificates were only collateral, they had never been acted

and that we didn't have any agent in Florida, we had no office in Florida and we had no holdings in Florida whatsoever.

(Mr. Shields) That's all.

(Mr. Reynolds) No questions.

(Mr. Shields) We rest, Your Honor.

(Argument off the record.)

(T.48) (Following excerpt is from trial of December 2, 1964, before the Honorable Lynn Gerald, Circuit Judge, and a jury in the Lee County Courthouse, Fort Myers, Florida; James A. Franklin, Jr., Esq., Attorney at Law, of the Law Firm of Henderson, Franklin, Starnes & Holt, Fort Myers, Florida, representing the Plaintiffs.)

(Mr. Franklin) Your Honor, the Plaintiffs will offer as Exhibit 1 a document entitled Notice of Trial on Damages.

(The Court) Very well.

(Document handed to the Clerk.)

(The Court) Mr. Reporter, this document having been originally filed in the record in the case, it will remain attached to the record rather than attached to the transcript of notes.

(Mr. Franklin) I will hand you this instrument in a few moments. It simply shows on behalf of Mr. Sapp that we did give notice of the trial day to the parties to this suit so that they had the opportunity to be here.

(T.49)

STATE OF FLORIDA)

COUNTY OF LEE)

I, Barney Schultz, Official Court Reporter for the Circuit Court of the Twelfth Judicial Circuit of the State of Florida, do hereby certify that a hearing was had in the cause styled in the caption hereto, on page one hereof, at the time and place also set out in said caption; that I was authorized to and did attend said hearing and report the proceedings had therein, including the testimony, fully and accurately in shorthand, and that the foregoing typewritten pages numbered 1 to 47, inclusive, constitute a full and correct transcript of my shorthand report of the testimony taken at said hearing; and that the typewritten page numbered 48 is a correct transcript of an excerpt of the proceedings at the trial held on December 2, 1964.

In Witness Whereof I have hereunto set my hand this 26th day of January, A.D. 1966.

/s/ Barney Schultz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Brief of Appellant's has been furnished by U.S. Mail upon Duane A. Reynolds, Esq. of the Law firm of Henderson, Franklin, Starnes & Holt, P. O. Box 280, Fort Myers, Florida, 33902 this day of January, 1968.

Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1048

EVERSHIELD PRODUCTS, INC.,
Petitioner,

versus

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

Case No. 1048

EVERSHIELD PRODUCTS, INC.,
Petitioner,

v.

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PRELIMINARY STATEMENT

Petitioner, EVERSHIELD PRODUCTS, INC., was a Defendant in the trial court below.

Respondents, J. A. SAPP and D. C. SAPP, d/b/a TICE SUPERMARKET, were Plaintiffs in the trial court below.

The following symbols will be used in this brief to refer to other documents on file with this Honorable Court:

TR - Transcript of Testimony
R - Record of Appeal
A - Petitioner's Appendix
B - Petitioner's Petition for Writ of Certiorari
E - Petitioner's Exhibits
F - Respondent's Reply to Petition for Writ of Certiorari
G - Respondent's Appendix
H - Respondent's Exhibits

OPINIONS BELOW

The opinion of the trial court, the Circuit Court of the Twelfth Judicial Circuit in and for Lee County, Florida, is unreported. (R 27-28) (A 12-13). The opinion of the District Court of Appeal, Second District of the State of Florida, is reported in 195 So.2d 10, 2nd Dist. Ct. App., Fla., 1967. (A 15-36)(R 86-105). The opinion of the Supreme Court of Florida is reported in 204 So.2d 209, Fla. Sp. Ct., 1967. (A 38-39).

OBJECTIONS TO JURISDICTION AND GROUNDS FOR DISMISSING PETITION

I. PETITIONER FAILED TO SPECIFY THE STAGE IN THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND IN THE APPELLATE COURT, AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUES-

TIONS SOUGHT TO BE REVIEWED WERE RAISED, THE METHOD OF RAISING THEM, THE WAY IN WHICH THEY WERE PASSED UPON BY THE COURT, AND THE PORTIONS OF THE PROCEEDINGS SHOWING THE FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED AS REQUIRED BY SUPREME COURT RULE 23(1)(f).

II. PETITIONER FAILED TO SET FORTH IN ITS PETITION THE STATUTORY PROVISION CONFERRING ON THIS COURT JURISDICTION TO REVIEW THE DECREE IN QUESTION BY WRIT OF CERTIORARI AS REQUIRED BY SUPREME COURT RULE 23(1)(b)(iii).

III. CERTIORARI WILL NOT LIE TO REVIEW AN OPINION OF A STATE APPELLATE COURT THAT IS BASED UPON QUESTIONS OF FACT DECIDED IN THE TRIAL COURT.

The decree sought to be reviewed is the opinion of the District Court of Appeal, Second District of the State of Florida, and was entered February 10, 1967. An appeal was taken to the Florida Supreme Court, but dismissed September 29, 1967, for lack of jurisdiction. A Petition for Rehearing was denied October 26, 1967. The Petition for Writ of Certiorari was filed in this court on January 24, 1968.

QUESTION PRESENTED FOR REVIEW

WHERE A FOREIGN CORPORATION DOING BUSINESS IN FLORIDA ELECTS NOT TO CONTEST JURISDICTION OR TO DEFEND A SUIT PENDING AGAINST IT IN THE FLORIDA COURT SYSTEM UNTIL AFTER JUDGMENT IS ENTERED EVEN THOUGH IT HAD ACTUAL KNOWLEDGE OF THE SUIT BY (1) SERVICE OF PROCESS ON ITS AGENT TRANSACTING BUSINESS FOR IT IN FLORIDA, (2) RECEIPT OF A COPY OF THE SUMMONS AND COMPLAINT BY REGISTERED MAIL, AND (3) RECEIPT OF A COPY OF NOTICE OF TRIAL ON DAMAGES, HAS THE CORPORATION BEEN DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISION

The constitutional provision relied upon by Petitioner is Section 1 of the Fourteenth Amendment which reads as follows:

"AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Constitution, Amend. XIV.*

STATEMENT OF CASE

1. On August 9, 1963, Respondents filed a complaint against Petitioner and Evershield Liquid Tile of Florida, Inc., hereinafter referred to as "Liquid", in the Circuit Court of the Twelfth Judicial Circuit, Lee County, Florida. (R 1-3)(A 1-3).

2. On August 9, 1963, a summons at law was issued as to Petitioner and Liquid with a return being made on August 12, 1963. (R 4-7) (A 42-45).

3. Petitioner failed to plead within the time allowed under Florida practice (twenty (20) days) and a default was taken September 24, 1963. (R 9) (A 4).

4. The Praecipe for Docketing was filed July 31, 1964, (R 10) and Notice of Trial on Damages was duly served on Respondent November 20, 1964. (H-4).

5. Pursuant to said notice, the trial on damages was held December 2, 1964, and the jury entered a verdict for Respondents against Petitioners and "Liquid" for Twelve Thousand Five Hundred and 00/100 ($12,-500.00) Dollars (R 11)(A 5) and final judgment was entered December 4, 1964. (R 12)(A 5).

6. On January 13, 1965 Petitioner filed a petition contesting the judgment on the sole ground that Petitioner "is not bound by the judgment of the court because of lack of notice." (R 14-20)(A 6-8). Respondents filed a reply to the petition denying the allegations as to lack of notice and affirmatively pleading Petitioner had actual notice of the action and took no steps to contest jurisdiction. (R 23-24)(A 10-11).

7. A hearing was held on the petition with both parties offering testimony and exhibits. Thereafter on October 14, 1965, the trial judge entered an order denying the petition and upholding the judgment. (R 27-28) (A 12-13).

8. The case was then appealed by Petitioner to the Second District Court of Appeals in Florida who affirmed the decision of the trial court on February 10, 1967. (R 86-105)(A 15-36). Thereafter, the Petitioner appealed to the Florida Supreme Court who then dismissed the appeal for lack of jurisdiction. (A 38-39). The Supreme Court of Florida denied the petition for rehearing. (A 41).

STATEMENT OF FACTS

1. In 1959 George Skadding and Paul. Petrick, officers of Petitioner, a Maryland corporation, decided to form Liquid, a Florida corporation, to be an applicator and distributor of certain products manufactured by Petitioner. (TR 27)(A 62-63).

2. Liquid was formed and George Skadding was made president of the company and was president on the records of the Secretary of State of Florida at the time this suit was instituted. (TR 25 and 28)(A 60 and 62).

3. Liquid and Petitioner worked closely together in the sale, distribution, and application of the products manufactured by Petitioner in the State of Florida by:

a) Petitioner sells products to Liquid to be used and resold in Florida (TR 27)(A 61-62);

b) Petitioner supplies Liquid with advertising material (TR 9) (A 49-50);

c) Petitioner supplies Liquid with sales assistance (TR 9)(A 49-50);

d) Petitioner extended $30,000.00 credit to Liquid (TR 26 and 46) (A 60, 61, 74-75);

4. The president of Petitioner helped to organize Liquid and was an officer of the company (TR 25 and

26) (A 60 and 61) and Petitioner supplied Liquid with technical sales assistance. (TR 9)(A 49-50).

5. Liquid sold products manufactured and advertised by Petitioner to Respondents for installation in Respondent's grocery store in Fort Myers, Florida. (A 2).

6. Respondents used the product in remodeling refrigerated rooms in the market. It was soon discovered the material was defective and caused obnoxious odors which caused great quantities of food to become unmerchantable. (A 1-3). Respondents then filed an action against Petitioner and Liquid on breach of warranty. (A 1-3).

7. A summons was issued and served on George Skadding as president of Petitioner. (A 42-43).

8. George Skaddings was served as president of Petitioner. (R 7). At this time he was an applicator for Petitioner in the State of Florida. (TR 25). Upon being served with a copy of the complaint and summons, Skaddings called Harris who was then the manager of Liquid. Harris picked up the papers and advised Skaddings he would take care of it. (TR 24). Harris had previously advised Petitioner it was going to be sued over this matter. (TR 34). Upon picking up the papers he made an investigation and found there was no defense (TR 32). and then turned the papers over to C. E. Tozzie, the representative of the product liability insurance carrier for both Petitioner and Liquid for the purpose of defending the suit. (TR 34).

The insurance agent after first obtaining an extension of time for filing a pleading, then sent the summons and complaint to Petitioner by registered mail return receipt requested some seven (7) days before the time for filing a pleading had expired. (TR 40). The summons and complaint were received by Petitioner on September 19, 1963. (TR 41 and 44). No pleading was filed and on the 43rd day after service a default was then entered. (A 4). Thereafter, a notice of trial on damages was sent to Petitioner. (H 4) Petitioner elected to make no appearance, even after receipt of the notice of trial. (TR 14).

9. Respondents had actual knowledge of the suit and received a copy of the summons and complaint within the time necessary to defend the suit or to contest jurisdiction by appropriate motion. (R 42 and 45) (A 72, 73). The Respondents elected to do neither until after final judgment was entered.

ARGUMENT ON OBJECTIONS TO JURISDICTION AND GROUNDS FOR DISMISSING PETITION

I

PETITIONER FAILED TO SPECIFY THE STAGE IN THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND IN THE APPELLATE COURT, AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED, THE METHOD OF RAISING THEM, THE WAY IN WHICH THEY WERE PASSED

UPON BY THE COURT, AND THE PORTION OF THE PROCEEDINGS SHOWING THE FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED AS REQUIRED BY SUPREME COURT RULE 23(1)(f).

The jurisdiction given by statute to the Supreme Court to issue writs of certiorari is one that the court has determined should be used sparingly and with caution. There must be special and important reasons for issuing the writ. *American Const. Co. v. Jacksonville, T. and K. W. Ry. Co.*, 148 U. S. 372, 37 L. ed. 486, 13 S. Ct. 758. It is firmly established, and there is a Supreme Court Rule so providing (Sp. Ct. R. 19(1)), that a review on writ of certiorari is not a matter of right, but sound discretion. Petitioner has the burden of showing this sound discretion should be exercised in the instant case.

The prerequisites to the issuance of every writ of certiorari by the Supreme Court are that the case must have been decided on a federal question, that the federal question be raised at the earliest possible time in the case, and that the federal question be preserved throughout the case. Supreme Court Rule 23(1)(f) provides the procedure whereby a Petitioner can clearly set forth that these prerequisites have been met. Respondents respectfully submit that Petitioner did not comply with the rule. The reason is clear. Petitioner could not show in the record that this case was decided on a federal question in the trial or appellate courts of Florida.

A look at the record will show that Petitioner first made an appearance in this cause on January 13, 1965, by filing an instrument entitled Petition. (A 6). This was forty (40) days after the final judgment had been entered. (A 5). This Petition alleged (1) process was served on George Skaddings who was not an agent of the Company, (2) Petitioner was never served through Secretary of State, (3) there is no relationship between Petitioner and Liquid and (4) Petitioner has never received a copy of the bill of complaint or service of process. (A 6-7). The Petition ends by praying:

> "That the verdict and judgment of the Court be amended to strike it as a party, and that the records of the court be expunged to show that Evershield Products, Inc. is not bound by the judgment of the Court *because of lack of notice.*" (Emphasis supplied) (A-7).

Nowhere in its original Petition did Petitioner complain to the trial court that it had been deprived of any Federal or constitutional rights. The relationship between Petitioner and Liquid, whether Petitioner received a copy of the complaint and process, and whether Petitioner had notice, were all factual questions that were resolved by the trier of fact, the trial judge, against Petitioner. (A 12-13). The remaining question of whether Petitioner was served through the Secretary of State is a matter of State law.

The order denying petition of Evershield Products, Inc. entered by the trial judge found as a matter of fact that:

a) Petitioner was duly served with a copy of the summons and complaint by service upon an agent of Petitioner doing business for it in the State of Florida, and (A 12)

b) The officers of Petitioner had received a copy of summons and complaint by registered mail, and (A 12)

c) Petitioner had forenotice and an opportunity to defend, but chose not to contest jurisdiction until after a jury verdict, and (A 12)

d) Petitioner did business in Florida through its agent "Liquid", and (A 12)

e) Strong economic ties existed between Petitioner and Liquid. (A 12)

The trial judge then correctly held that the petition be denied, service on Petitioner be confirmed, and the judgment approved and ratified. (A 13). The trial judge was not asked to rule on a Federal question and did not do so.

The basis of the opinion by the Second District Court of Appeals of Florida is clearly seen where the court speaking through Judge Pierce stated as follows:

> "From the foregoing specific findings made by the trial judge two major factual postulates may be deduced: (1) Evershield Products was doing business in Florida through a broker,

> jobber or distributor, namely Evershield Liquid Tile, and that there were strong economic ties existing between the two corporations; and (2) Evershield Products, through its Maryland officers, had actual personal notice of pendency of the Florida suit by having received copy of the complaint and summons by registered mail in ample time to defend, and also having been served with actual process in personam through an agent transaction business for it in Florida. 195 So.2d at 12-13 (A 19)

The entire opinion is based upon these two factual findings and the case *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.* CCA 5, 1964, 332 F.2d 135. The court stated that "the decision of the Florida appellate courts are consistent with the foregoing quoted holdings in *Mooney*". (A 31) The court then analyzed the relevant Florida cases and demonstrated how they were consistent with *Mooney*. Nowhere in the opinion does the court attempt to base its opinion on a Federal or constitutional question.

Finally, the Supreme Court of Florida dismissed the appeal made to it without opinion. *Evershield Products, Inc. v. Sapp*, 204 So.2d 209, Sp. Ct. Fla., 1967. One of the grounds upon which the Supreme Court of Florida could have reviewed the case was that the opinion of the court of appeals construed a controlling provision of the Federal constitution. Section 4(2), Article V, *Florida Constitution.*

By examining the record in this case it is clear

that Petitioner was unable to demonstrate that it had raised a Federal question in the court of first instance or that any of the State appellate courts had ruled on a Federal question for reason that the record in this case is void as to these matters. The Supreme Court will not review a final state court judgment, even if it denies some title, right, privilege or immunity of the unsuccessful party, unless it appears from the record that the right was specially set up or claimed and denied in the state court as belonging to the party under the Constitution. *F. G. Oxley Stove Co. v Butler County,* 166 U.S. 648, 41 L. ed. 1149, 17 S Ct. 709.

In *American Surety Co. v Baldwin,* 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98, and 86 ALR 298, it was held that the Petitioner's claim that a judgment of a State court is void under the due process clause of the Fourteenth Amendment as having been entered without notice and an opportunity to be heard, was not seasonably made so as to serve as a basis of review in the Supreme Court of the United States. The court held as follows:

> "The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the federal claim. The proceedings culminating in that judgment were these. On June 26, 1930, three days after the entry by the Idaho district court of judgment against the Surety Company on the supersedeas bond, it filed a motion in that court to vacate and set aside the judgment. The grounds there urged in support of the motion were

wholly state grounds. They were that the judgment was void, because there had been no breach or condition of bond, properly construed; that the judgment had been entered without notice to either the Surety Company or the Singer Company; and that the enforcement of the judgment would be contrary to good conscience and equity. After hearing arguments on the motion, the Idaho district court ordered that the judgment be vacated and set aside, and that the execution issued pursuant thereto be quashed. The Baldwins appealed to the Supreme Court of Idaho; and upon the presentation of their appeal no federal question was raised by either party. The Supreme Court on May 2, 1931, reversed the order vacating the judgment. It declared that the only issue before the trial court on motion to vacate was its own jurisdiction to render the judgment against the Surety Company on the supersedeas undertaking; that such jurisdiction existed by virtue of the surety company's execution of the undertaking in the cause; that the question which had necessarily been presented was: 'Did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the supreme court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company?' that the trial court thus had the power and duty to construe the bond; that 'whether it decided right

or wrong its decision was a judgment which could be reviewed for error, if there was error, only by the Supreme Court on appeal; and that the alleged error could not be raised on motion to vacate. 50 Idaho, 609, 614-616, 299 Pac. 341.

"The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

The rules may be summarized by saying that it is essential to the jurisdiction of the Supreme Court in reviewing a decision of a court of a state on a petition for writ of certiorari that it must appear affirmatively from the record, not only that a federal question was seasonably presented for decision to the court of first instance and to the highest court of the state having jurisdiction, but that the decision of the

federal question was necessary to the determination of the case. *McGoldnick v Gulf Act Corp.*, 309 U.S. 2, 85 L ed. 536, 60 S. Ct. 375. The Respondent respectfully submits the Petitioner cannot bring this case within the purview of the rules heretofore cited and that this Honorable Court should refuse to grant the writ of certiorari.

II

PETITIONER FAILED TO SET FORTH IN ITS PETITION THE STATUTORY PROVISION CONFERRING ON THIS COURT JURISDICTION TO REVIEW THE DECREE IN QUESTION BY WRIT OF CERTIORARI AS REQUIRED BY SUPREME COURT RULE 23 (1)(b)(iii).

The Supreme Court Rule 23(1)(b)(iii) provides in part as follows:

> "The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari."

The petition filed herein is completely silent as to this point for reason that there is no statutory provision that confers jurisdiction on this court to review a judgment founded on a factual issue. For this reason, the petition for writ of certiorari should be denied.

III

CERTIORARI WILL NOT LIE TO REVIEW AN OPINION OF A STATE APPELLATE COURT THAT IS BASED UPON QUESTIONS OF FACT DECIDED BY THE TRIAL COURT.

Respondents have heretofore shown by referring to the record that the trial and appellate courts in this case based their decision on a factual determination. The case law is clear that the Supreme Court will not grant certiorari to review judgments based solely on questions of fact. *NLRB v Waterman S. S. Corp.*, 309 U. S. 206. 84 L ed. 704, 60 S. Ct. 493. For this additional reason Respondents respectfully pray this petition for writ of certiorari be denied.

ARGUMENT ON QUESTION PRESENTED FOR REVIEW

WHERE A FOREIGN CORPORATION DOING BUSINESS IN FLORIDA ELECTS NOT TO CONTEST JURISDICTION OR TO DEFEND A SUIT PENDING AGAINST IT IN THE FLORIDA COURT SYSTEM UNTIL AFTER JUDGMENT IS ENTERED EVEN THOUGH IT HAD ACTUAL KNOWLEDGE OF THE SUIT BY (1) SERVICE OF PROCESS ON ITS AGENT TRANSACTING BUSINESS FOR IT IN FLORIDA, (2) RECEIPT OF A COPY OF THE SUMMONS AND COMPLAINT BY REGISTERED MAIL, AND (3) RECEIPT OF A COPY OF NOTICE OF TRIAL ON DAM-

AGES, HAS THE CORPORATION BEEN DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The three (3) issues raised in the petition for certiorari are embodied in the above question and Respondents will discuss each of the issues as stated in the petition as they relate to question presented for review as stated above.

REPLY TO PETITIONER'S ISSUE I

THE COURT ERRED IN THAT THE DEFENDANT, EVERSHIELD PRODUCTS, INC. DID NOT RECEIVE NOTICE OF FILING OF THE COMPLAINT AND WAS NOT SERVED WITH PROCESS

Issue I as stated by Petitioner is a pure question of fact and relates solely to the findings of fact by the trial judge. This court has consistently held that it will not retry the facts. *Esenwein v Commonwealth of Pennsylvania ex rel Esenwein,* 65 S. Ct. 1118, 325 U. S. 279, 89 L ed. 1608. Petitioner is asking this court to weigh the evidence without having had the opportunity to see and hear the witnesses. We must not forget that Petitioner's prayer in its original petition was founded on a factual issue "lack of notice." (A 7). No claim was made that any constitutional or federal rights had been denied.

There is substantial competent evidence to support

each of the factual findings of the trial judge. The first finding of fact is that Petitioner was duly served with a copy of the complaint and summons in this cause by service upon an agent transacting business for it in the State of Florida. (A 12). In the instant case service was not made upon the Secretary of State as provided in F.S. Sec. 47.30, but rather upon "any agent" under F.S. Sec. 47.17. There can be no doubt that "Liquid" who was selling products manufactured by Petitioner, who was using advertising material supplied by Petitioner, who was working with technical sales representatives of Petitioner in Florida, and who was financing the business on credit extended by Petitioner was an agent within the purview of F.S. 47.17. (TR 9 and 27)

Second, the trial court found that the officers of the corporation had received a copy of the summons and complaint by registered mail and had forenotice and an opportunity to defend. (A 12). As pointed out by the Second District Court of Appeals, there is ample evidence in the record to support this finding. (A 23). George Skaddings was served as president of Petitioner. (R 7) At this time he was an applicator for Petitioner in the State of Florida. (TR 25) Upon being served with a copy of the complaint and summons, Skaddings called Harris who was then the manager of Liquid. Harris picked up the papers and advised Skaddings he would take care of it. (TR 24) Harris had previously advised Petitioner it was going to be sued over this matter. (TR 34) Upon picking up the papers he made an investigation and found there was no defense (TR 32) and then turned the papers over to

C. E. Tozzie, the representative of the product liability insurance carrier for both Petitioner and Liquid for the purpose of defending the suit. (TR 34) The insurance agent after first obtaining an extension of time for filing a pleading, then sent the summons and complaint to Petitioner by registered mail return receipt requested some seven (7) days before the time for filing a pleading had expired. (TR 40) The summons and complaint were received by Petitioner on September 19, 1963. (TR 41 and 44) No pleading was filed and on the 43rd day after service a default was then entered. (A 4) Thereafter, a notice of trial on damages was sent to Petitioner. (H 4) Petitioner elected to make no appearance, even after receipt of the notice of trial. (TR 14). It was upon these facts that the trial judge found the Petitioner did have notice and an opportunity to defend.

The third finding of fact by the trial judge was that Petitioner did not choose to raise the jurisdictional issue until after the case had been tried before a jury and a judgment entered. The factual basis for this finding is set forth above. Presumably if the verdict had been in favor of Petitioner, there would have been no objection to how service was made. The opinion of the Second District Court of Appeal accurately states the situation as follows:

> "Here, as in *Mooney Aircraft*, the nonresident voluntarily and knowingly elected to ignore the service of process upon it in Florida, and having made an election, it cannot now complain, that such service being upheld, the judg-

ment it suffered not to resist is allowed to stand" *Evershield Products, Inc. v. Sapp*, 195 So.2d at 18.

The final finding of fact by the trial court was that Petitioner did business in Florida through its broker, jobber, or distributor, "Liquid", and that close economic ties existed between them. (A 12). There is no conflict in the record that Liquid did sell, advertise, service, and finance the products of Petitioner in Florida. (TR 9 and 27). The Petitioner insists that a service was being sold by Liquid and that no product is involved in this case as was in *Delray Beach Aviation Corporation v Mooney Aircraft, Inc.*, CCA 5, 1964, 332 F.2d 135. (B 22). The record is emphatically clear that Liquid was organized for the purpose of being an authorized applicator of Petitioner. (TR 23). It is submitted that in order for "Liquid" to be an applicator, there must be a product to be applied. It was this product that was sold to and applied on the walls of the freezers in Respondent's store.

The factual determinations have been made in this case by the trial court as prayed for in the original petition. The determinations were against Petitioner. Respondents respectfully submit that this petition for writ of certiorari is merely a request asking this court to retry the factual issues in this case and therefore should be denied.

REPLY TO PETITIONER'S ISSUE II

THE COURT ERRED IN THAT THE RECORD ON APPEAL SHOWS THAT THE SUMMONS WAS SERVED ON THE WRONG PARTY, WHICH DID NOT BIND EVERSHIELD PRODUCTS, INC., BECAUSE SAID DEFENDANT HAD NO NOTICE.

Again Petitioner raises that the issue in effect states the service was defective *because said Defendant had no notice.* By stating this issue as it did Petitioner concedes that if it had notice, there would be no reason for it to file this petition for writ of certiorari.

The reason that Petitioner claims it did not have notice is that the summons and complaint were served on the wrong person. The record shows that the process in this cause was served on George Skaddings as President of Petitioner. (A 42 and 43). Although Skaddings was not the president of Petitioner he was the president of "Liquid" who was the agent of Petitioner in the State of Florida. Skaddings by his own admission was an applicator for Petitioner. (TR 25).

The pertinent Florida Statutes are F.S. 47.16(1), F.S. 47.17, and F.S. 47.171 which provide as follows, to-wit:

> 47.16(1) - "The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations,

and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to non-residents and others to operate, conduct, engage in, carry on a business or business venture in the state, or to have an office or agency in the state, shall be deemed equivalent to an appointment by such persons and foreign corporations of the secretary of state of the state as the agent of such persons or foreign corporations upon whom may be served all lawful process in any action, suit or proceeding against them, or either of them, arising out of any transaction or operation connected with or incidental to such business or business venture, and the acceptance of such privilege shall be signification of the agreement of such persons and foreign corporations that any such process against them or either of them, which is so served shall be of the same legal force and validity as if served personally on such persons or foreign corporations. Service of such process shall be in accordance with and in the same manner as now provided for service of process upon nonresidents under the provision of §47.30. Provided that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute."

47.17 - "Service of process on private corporation. Process against any corporation, domestic or foreign, may be served:

(1) Upon the president or vice-president, or other head of the corporation; and in the absence of such head:

(2) Upon the cashier, treasurer, secretary or general manager; and in the absence of all the above:

(3) Upon any director of such company; and in the absence of all of the above:

(4) Upon any officer or business agent, resident in the state.

(5) If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state.

(6) This section shall not apply to service of process upon insurance companies.

(7) The provisions of this section shall be cumulative to all existing laws."

47.171 - "Service of process; domestic and foreign corporations. - When any domestic or foreign corporation shall fail to comply with §§47.34 and 47.35 relating to the designation of

> the place for service of process, or in the alternative, with §47.36 relating to the designation of the office of the clerk of the circuit court as a place for service or process, then process directed to any domestic corporation failing to comply with said sections may be served upon any officer or agent of such domestic corporation resident in the state or transaction business for it in the state. Process directed to any foreign corporation failing to comply with said sections may be served upon any agent of such foreign corporation transacting business for it in Florida."

The relationship between the statutes in question is clearly enunciated by the opinion of Judge Pierce in the opinion of the Second District Court of Appeals wherein he states:

> "Since 1951 Florida has had upon its statute books what are known as the Long Arm Statutes, which, as the term implies, reach out to render amenable to the Florida state courts foreign corporations doing business within the State of Florida, and which are so intended. These Long Arm statutes, or more precisely the 'Florida Long Arm Jurisdiction Statutes' have been enacted, and subsequently enlarged and amended, since 1951. Two of these statutes are pertinent to this case, and appear as Secs. 47.16(1) and (2), and 47.17. These sections are carried herewith in the margin.

"An interesting and instructive discussion of the antecedent history of the 'Long Arm' statutes is found in the Mooney Aircraft case, infra (test 332 F.2d 137, et seq.)-interesting in that it vividly depicts the 'ins and outs' of the Florida law, both statutory and case law; and instructive in that it shows the clear intent of the Florida legislature in enacting the 'Long Arm' statutes. It seems that the Federal Court of Appeals, 2nd Circuit, in Berkman v Ann Lewis Shops, Inc., 246 F.2d 44, affirmed a Federal District Court, 142 F.Supp. 417, which held the original Long Arm statute 'inadequate to sustain an earlier Florida State Court judgment' but in so holding observed that '(t)his is not to say that a statute might not constitutionally be drawn which would make the presence in a state of a wholly-owned subsidiary of a foreign corporation sufficient basis to assert jurisdiction over the parent company,' 142 F. Supp., text 422. Florida instantly reacted in a 'legislative reflex' to the Berkman decision 'by adding Subsection (2) to §47.16 *** so as to encompass distributors, jobbers, wholesales, and brokers for foreign corporations.' And, to use the colorful language in Mooney Aircraft (test 332 F.2d at page 138), Florida's Long Arm 'muscles were beefed up by the legislative declaration of policy stated in emphatic terms' in the 1957 amendment (now appearing as F.S. Sec 47.16(2), F.S.A.), as follows:

'WHEREAS, persons, firms and corporations in other jurisdictions are directly or indirectly furnishing millions of dollars worth of tangible and intangible personal property to persons, firms and corporations in this state each year; and

'WHEREAS, litigation in both tort and contract frequently arises out of the purchase, lease, consignment, use and consumption of such property each year; and

'WHEREAS, the cost and expense of going to other jurisdictions, both national and international, frequently has the practical effect of denying all rights and remedies regarding such purchase, lease, consignment, use and consumption; and

'WHEREAS, it is just and fair that such litigation be conducted in this state rather than in a foreign jurisdiction.'

"F.S. Sec. 47.16(1), F.S.A. provides that any foreign legal entity, natural or corporate, who 'accepts *** the privilege' of engaging 'in business or a business venture' in Florida or has an office in the State shall be deemed to have appointed the Secretary of State of Florida as his agent for acceptance of process in the State courts in any suit 'arising out of any transaction or operation connected with or incidental to such business or business venture'; provided that if the Florida entity has

> a resident agent in Florida process shall be served upon such resident agent; and, provided further, that process shall be served as provided upon non-residents in Section 47.30 (Emphasis supplied). Sub-section (2) of Section 47.16 provides that any person or corporation who sells or consigns personal property to any legal entity in Florida 'through brokers, jobbers, wholesalers or distributors' shall be conclusively presumed to be carrying on a business or business venture in this State.
>
> "Sec. 47.17 provides that if a foreign corporation has no officers, directors or agents in Florida, 'service may be made upon any agent transacting business for it in this state' (Emphasis supplied).
>
> "Sec. 47.30 provides for service of process upon the Secretary of State."

Petitioner did not appoint a resident agent for service of process as required by F.S. 47.171 and thus was answerable to service of process by service upon "*any agent* of such foreign corporation transacting business for it in Florida." *Zinn v Chasler Pfiger and Co.*, 128 So.2d 594, (Fla. App. Ct., 1961). Was there any agent to be served? The trial court said yes and George Skaddings, an applicator of Petitioner and president of "Liquid", the distributor for Petitioner, was served.

The problem raised by Petitioner is that George Skaddings was erroneously designated as president of

Petitioner. This designation by Liquid on the records of the Secretary of State was permitted to remain, so Liquid cannot now say it was a mistake—and thus escape the processes of the courts. Thus, the question actually before this court is:

> WHERE A FOREIGN CORPORATION HAS ACTUAL NOTICE OF SUIT BY SERVICE OF PROCESS OF SUMMONS AND COMPLAINT ON ITS CORPORATE AGENT TRANSACTING BUSINESS IN FLORIDA UNDER F.S. 47.17, IS PROCESS VOID SO AS TO DEPRIVE THE COURT OF JURISDICTION IF THE PERSON SERVED IS ERRONEOUSLY DESIGNATED AS PRESIDENT OF THE FOREIGN CORPORATION?

Inasmuch as service in this case was instituted pursuant to the provisions of Florida Statute 47.17(5) it is necessary to determine the test used by the Court of this State in determining whether service is valid. This question was decided in *H. Bell and Associates, Inc. v Keashey and Madison Co.*, 140 So.2d 125 (Fla. App. Ct., 1962) where in discussing said state the court held:

> "The test used to determine if service of process upon an agent is sufficient to constitute service upon a corporation is whether or not, in fact, the corporation will receive notice of the action . . . obviously there is no necessity to have this test applied to a managing official . . . because service is accomplished on

> the one in whom responsibility for management of the corporation reposes." 140 So.2d at 127.

The facts in this case, as previously recited, show that the person served did in fact institute a course of action which resulted in the Petitioner receiving a copy of the summons and complaint filed in this cause.

The question presented in this case has been decided in *Largay Enterprises, Inc. v Berman,* 61 So.2d 366 (Sp. Ct., Fla., 1952). In this case service was made on George H. Largay, Jr. as an individual and as Director of Largay Enterprises Incorporated, a foreign corporation. The corporation filed a motion to quash and plea in abatement which stated that Largay was not an officer, director or agent of the corporation. The Supreme Court held:

> "(6) The question then becomes: Was there a valid service of process on the corporate defendant under the pluries summons dated January 10, 1950? As heretofore noted, the sheriff's return on his service of this summons recited that service was made upon George H. Largay, Jr., as a director of the corporate defendant 'in the absence of the president, vice president and other heads, and in the absence of the cashier, secretary, treasurer and the general manager.' Our statute, Section 47.17, Florida Statutes, F.S.A., providing for the service of process on private corporations, establishes five classifications of persons upon whom service may be made to effect service on the corpora-

tion. Since the decision of this court in Drew Lumber Co. v. Walter, 45 Fla. 252, 34 So. 244, 245, it is established in this jurisdiction that 'a return showing service upon an inferior officer or agent of a corporation, in order to bind the corporation, must show the absence of all officers of a superior class designated in the statute as those upon whom service shall be had, before resort is had to service upon one of an inferior class. The absence of all members of a superior class is a condition precedent to the validity of service upon a member of an inferior class.' Drew Lumber Co. v Walter, supra.

(7, 8) Under this rule, the service on George H. Largay, Jr., 'as a director,' would not have been good if there had, in fact, been other members of a superior class upon whom service could have been made. But we do not think that the rule operates conversely. It must be remembered that it is the service of the writ, and not the sheriff's return, which gives the court jurisdiction over the defendant. State ex rel. Briggs v Barns, 121 Fla. 857, 164 So. 539. Even though the evidence showed that George H. Largay, Jr. was not an officer or director of the corporate defendant at the time service was had upon him, it does show that he was an 'agent transacting business for it in this state', which is the fifth classification designated by Section 47.17, supra. It also shows that there were not in the jurisdiction at that time any

members of the first four classifications designated in Section 47.17. The service of the pluries summons dated January 10, 1950, was then, a valid service of process on the corporate defendant, as a matter of fact, and the return of the sheriff could have been amended to speak the truth." 61 So.2d at 370 and 371

As additional authority for the Trial Court's decision we refer again to the *Delray* case, supra., wherein the court held that even though the local distributor and foreign aircraft manufacturer did not stand in the traditional relationship of principal and agent, their close economic ties were sufficient to satisfy the Florida standard to constitute the distributor a resident agent under service of process statute requiring that there be a legal or moral duty on the part of the agent to report and properly handle summons served on him as agent of the corporation. The same reasoning would apply in this case.

Respondents respectfully submit that the summons in this cause was served upon the appropriate person for the reasons set forth above and that as a result of such service Petitioner had actual notice of suit and an opportunity to defend.

REPLY TO PETITIONER'S ISSUE III

THE COURT ERRED IN THAT THE CONSTITUTIONAL RIGHTS OF EVERSHIELD PRODUCTS, INC. WERE VIOLATED IN THAT THE PROCEDURE DID NOT CON-

STITUTE DUE PROCESS OF LAW UNDER SECTIONS 4 AND 12 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF FLORIDA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IT FURTHER VIOLATED THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS AMENDED.

There is no question that notice and opportunity to be heard must be provided for as a matter of right, not of grace. *Coe v Armour Fertilizer Works,* 227 U.S. 413, 35 S.Ct. 625, 59 L ed. 1027(1915). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v Meyer,* 311 U.S. 457; *Grannis v Ordean,* 234 U.S. 385; *Priest v Las Vegas,* 232 U.S. 604; *Roller v Holly,* 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v Ordean,* supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v Holly,* supra, and cf. *Goodrich v Ferris,* 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The

reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it was in itself reasonably certain to inform those affected.

At this point a distinction should be made between a total want of service, where the Petitioner has received *no notice at all,* and service which is irregular but actually gives Petitioner notice of proceedings against it. The former confers no jurisdiction of the person or the court, but the latter does; hence a judgment based on service that is defective or irregular is voidable only and, not void. *Gore v Chillingsworth,* (1936) 126 Fla. 645, 171 So. 643. In the case before the Court the Petitioner had notice of suit and should have taken affirmative action. A Petitioner cannot with impunity ignore process appearing valid on its fact. If the Petitioner thinks service is defective, it must submit its contention to the court issuing process. *Walker* v *Carver,* (1927) 93 Fla 337, 112 So. 45. *Petitioner took the bold course of ignoring the process until after judgment had been rendered.* This it cannot do.

A case almost similar to the case before this court is *Delray Beach Aviation Corp. v Mooney Aircraft, Inc.,* 332 F.2d 135 (1965). In this case Delray Beach Aviation brought a suit against Mooney Aircraft in a Florida State court. A default judgment was entered in favor of Plaintiff who brought suit on the judgment in Federal court in Texas. The Federal District Court entered judgment for Defendant on ground of improper service of process. The United States Court of Appeals

reversed. The facts of the case are as follows with a comparison of the facts in this case in parentheses:

1. Delray purchased a plane in Florida from Metropolitan, a distributor for Mooney. (Respondent purchased resin from Liquid a distributor for Petitioner) (TR 9)

2. Mooney sold airplanes to Metropolitan for the purpose of resale in Florida and supplied to Metropolitan promotional material, sale assistance, personnel training and supervision. (Petitioner sold merchandise to Liquid for resale in Florida and supplied promotional material, sales aids, personnel training and supervision). (TR 9, 27)

3. Mooney was informed about the suit brought by Delray. (Petitioner had notice of the suit brought by Respondents). (A 12 and 13)

4. Process was not served on Florida's Secretary of State but on Metropolitan as resident agent. (Process was served on George Skadding as President of Petitioner and Liquid). (A 42-45)

5. The process and complaint was forwarded by mail to Mooney. (The process and complaint was forwarded by mail to Petitioner). (TR 12, 42, 44, 45)

In reaching its decision that there had been valid service of process on Mooney and that there had been no violation of the United States Constitution the court held as follows:

"The last two sentences of §47.16(1) prescribed that the service of the process "shall be in accordance with and in the same manner as now provided for ** under the provision of §47.30." The last adds a provision "that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute." This brings into play §§ 47.30 and 47.17.

(9-11) Guided, as we must be, by the Florida standard concerning the attributes of one having the status of an "agent" for service of process, we think that Metropolitan was "a resident agent" and that service of process "upon such resident agent" was permissible. The District Judge seemed to think that Metropolitan could not be acting for Mooney Aircraft since each was engaged in its own separate business within the State of Florida. If that means that factually Mooney Aircraft was carrying on business within this assigned territory in its own right independent of Metropolitan, there is no basis in fact for such a finding. F.R.Civ.P. 52(a). If it means to imply that one cannot be a resident agent if his own interests are being advanced while serving the so-called principal, we think it is erroneous in law. Indeed, any such reasoning would be a repudiation of §47.16(1) and especially subsection (2). Under subsection (1), the acceptance by a nonresident "of the privilege *** to operate conduct, engage in, or carry on a

business or business venture in the state" is deemed to be an appointment of the secretary of state as the resident agent. Under subsection (2), anyone who "sells, consigns, or leases, by any means whatsoever" personal property "through brokers, jobbers, wholesalers, or distributors" shall be "conclusively presumed to be operating, conducting engaging in or carrying on a business or business venture in this state."

"If Florida constitutionally can, under certain circumstances, declare that one can be carrying on a business through a distributor, then it is incongruous to conclude, as the District Judge presumably did, that the actions of Metropolitan were not in furtherance of the interests of Mooney Aircraft.

"The inescapable fact which courts ought to be able to recognize is that Mooney Aircraft and Metropolitan had, to a great extent, a mutual interest in the sale, service, and distribution of Mooney Airplanes. Paraphrasing a celebrated apothegm, what was good for Metropolitan was good for Mooney Aircraft, and vice versa.

(12) Although Metropolitan and Mooney Aircraft did not stand in the traditional relationship of principal and agent, their close economic ties were sufficient to satisfy the Florida standard that there be a "legal or moral duty

on the part of the (agent) to report and properly handle a summons served on him as agent of" the foreign corporation. *Mason v Mason Prod. Co.*, Fla. 1953, 67 So.2d 762, 763.

"This principle is followed by numerous courts. In *Fiat Motor Co. v Alabama Imported Cars, Inc.*, 1961, 110 U.S. App. D. C. 252, 292 F. 2d 745, 747, the court held that the District of Columbia Code provision for service "on the agent of such corporation or person conducting its business" was broad enough to cover a distributor similar to Metropolitan since the distributor "occupies such a responsible representative status as to make it reasonably certain that he will turn over the process." That court cited our earlier decision in *Acme Eng'r., Inc. v Foster Eng'r. Co.*, 5 Cir. 1958, 254 F2d 269. Of course this approach was recognized in International Shoe where the court stated that it "is enough that (the foreign corporation) has established such contacts with the state that the particular form of substituted service adopted *** gives reasonable assurance that the notice will be actual." 326 U.S. 310, at 320, 66 S.Ct. 154, at 160, 90 L ed. 95, 161 A.L.R. 1057. (Emphasis supplied.) 332 F.2d 135 (1964) at pages 142, 143.

* * *

"That means that Mooney Aircraft, armed with full, correct copies of the State Court

pleadings, and process, with detailed specific information from Metropolitan concerning the pendency of the case and the right under Florida practice to enter a special appearance, had a full, unrestricted opportunity to have the Florida Court pass upon its own statute and the sufficiency of the facts to support either amenability or the method of service, with right of review to the United States Supreme Court thereafter as to any federal constitutional questions. Of course the presence of this sensible and fair procedure does not compel a nonresident to submit either for the determination of that issue or the trial of the merits of the case. But in no sense does the risk of standing one's ground on amenability to process carry with it a forfeiture of the right to present a defense. That Mooney Aircraft has lost that opportunity is the consequence of its own deliberative choice to take the bold course.

(16) The result is that the Florida State Court judgment is entitled to full faith and credit, and the District Court should enter judgment thereon.

Reversed and remanded with directions. (332 Fed. 2d at Page 144) (Emphasis supplied)

The *Delray* case stands for the proposition that once a Defendant is armed with full correct copies of the State Court pleadings and process, the Defendant cannot set back and do nothing, but must enter a

special appearance to test the manner and sufficiency of process.

In the instant case the Trial Court found as a fact that the Petitioner was armed with full and correct copies of the pleadings and process. *This is not a case where the Petitioner learned a judgment had already been entered against it, but rather a case where the Petitioner deliberately chose to ignore the summons and complaint* in the same manner it choses to ignore the fact that the Trial Court found as a fact that it had actual notice of the suit.

The decision of the Supreme Court of the United States in *International Shoe Co. v State of Washington,* 326 U.S. 310, 90 L ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057 is applicable in the instant case wherein the court held:

> "We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual."

Notice of the suit, a copy of the complaint and summons, and a copy of the notice of trial on damages

were all in the hands of Petitioner in time to take necessary procedural steps to contest jurisdiction. Petitioner chose to look the other way and now this court should do likewise.

In Petitioner's brief they refer this court to *Davis Berkman vs Ann Lewis Shoph,* 242 F.2d 44 and *Fawcett Publications v Rand* 144 So.2d 512 (B 29) as authority that service is improper in this case. The obvious distinctions between these cases and the instant case are (1) both cases were decided under F.S. Sec. 47.16 and Sec. 47.30 whereas the instant case is under F.S. Sec. 47.17 and (2) in both cases the Defendant contested jurisdiction at the earliest possible time whereas Petitioner did nothing until after judgment was entered. The case of *Canon Manufacturing Co. v Ludhay,* 267 U.S. 333, 267 L ed. 634, cited on page 29 of the Petition, is distinguished from the instant case in that in *Cudhay* the court based its opinion on the fact that the subsidiary did *not act as agent* for the foreign corporation, whereas the finding of fact by the trial judge in this case is to the contrary.

Respondents respectfully submit that Petitioner was denied no constitutional right.

CONCLUSION

For the reasons set forth hereinabove Respondents respectfully pray this Honorable Court deny the Petition for Writ of Certiorari and in the alternative find that service upon Petitioner was proper, that Petitioner was denied no constitutional right, and that the judgment of the trial court be affirmed.

HENDERSON, FRANKLIN,
STARNES & HOLT
Attorneys for Respondent
Post Office Box 280
Fort Myers, Florida

By Julian Clarkson
Julian Clarkson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief has been furnished to SAMUEL KIMMEL of the firm of KIMMEL & POKORNY, 406 Jefferson Building, Towson, Maryland 21204, Attorneys for Petitioner this 14 day of February, 1968.

Julian Clarkson
Of Counsel, Julian Clarkson

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 20 1968
JOHN F. DAVIS, CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1967

No. 1048

EVERSHIELD PRODUCTS, INC.,
Petitioner,

versus

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

HENDERSON, FRANKLIN,
STARNES & HOLT.
Attorneys for Respondents
2100 Second Street
Post Office Box 280
Fort Myers, Florida 33902

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 1048

EVERSHIELD PRODUCTS, INC.,
Petitioner,

v.

J. A. SAPP and D. C. SAPP
d/b/a TICE SUPERMARKET,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TRAVELERS INSURANCE CO.
P. O. Box 4164, Sunrise Station
Professional Bldg. Sunrise Center
Fort Lauderdale, Fla.

September 11, 1963

Mr. Harry Harris
3431 S. W. 19th St.
Ft. Lauderdale, Florida

259193 (98-R-11049))
Evershield Liquid Tile
Re: Trice Super Mkt.

Dear Mr. Harris:

I am returning the Summons and Complaint served on Mr. George Skadding on August 12, 1963, as representative of the Evershield Liquid Tile of Florida, Inc., for alledged damages done to the refrigerator coolers in Tice's Supermarket at Fort Meyers, Florida in 1962. This complaint states that this work at the Tice Supermarket in Ft. Myers was carried out between May 15, 1962 and October 15, 1962 according to your contract with one, H. D. Rutleg, general contractor. The difficulty was discovered after the completion date of October 15, 1962, and was reported to The Travelers in November, 1962.

As we discussed, your policy with The Travelers does not provide coverage for losses involving products-completed operations, which is the case in this instance. I have talked with James A. Frank, Jr., the plaintiff's attorney in this suit, and have secured a verbal extension of time to file an answer to this complaint to September 23, 1963, before a default judgment is taken. Since this Summons and Complaint names Evershield Liquid Products, Inc. whose product was involved, we are sending them a copy of said Summons and Complaint in order that they may properly defend themselves in this matter.

The Travelers will not provide any defense for you under the terms and provisions of your policy for this incident.

If you have any further questions, please feel free to contact me.

Very truly yours,

C. E. Tozzie,
Resident Adjuster

CET:jef
cc Paul Petrlik-Franklin, Jr. Attny

Post Office Department
Official Business
Penalty for Private Use to Avoid
Payment of Postage, $300

Postmark of
Delivering Office
Sep. 16, 5 PM, 1963
Joppa, Md.

INSTRUCTIONS. Fill in items below and complete instructions on other side, if applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article Return Receipt Requested.

Registered No.
739985
Certified No.
Insured No.
Tile
Evershield

RETURN TO
Name of Sender
Travelers Ins. Co. Plf. 4
Street and No. or P. O. Box
P. O. 4164 7-27-65
City, Zone and State
Ft. Lauderdale, Fla.

INSTRUCTIONS TO DELIVERING EMPLOYEE

( ) Deliver *ONLY* to addressee
( ) Show address where delivered.
(Additional charges required for these services)

RECEIPT

Received the numbered article described on other side.
Signature or Name of Addressee (must always be filled in)
Evershield Liquid Products
Signature of Addressee's Agent, if Any
/s/ BETTY JANE BRAGG
Date Delivered
Sept. 16, 1963
Show where Delivered (only if requested)

NOTICE OF TRIAL ON DAMAGES

(Number and Title Omitted)

Filed: Nov. 20, 1964

TO: EVERSHIELD LIQUID TILE OF FLORIDA, INC.
1111 NE 7th Avenue
Fort Lauderdale, Florida
and
EVERSHIELD PRODUCTS, INC.
Joppa, Maryland

You are hereby notified that the trial of the above styled cause has now been scheduled for 9:30 A.M., December 2, 1964.

HENDERSON, FRANKLIN,
STARNES & HOLT
(Signed) JAMES A. FRANKLIN, JR.
Attorneys for Plaintiff
P. O. Box 280
Fort Myers, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above Notice was mailed this 20th day of November, 1964, to the above addressees.

(Signed) JAMES A. FRANKLIN, JR.
James A. Franklin, Jr.
Of Counsel

STATE OF FLORIDA
COUNTY OF LEE

I, D. T. Farabee, Clerk of Circuit Court of the Twelfth Judicial Circuit in and for Lee County, Florida, do hereby certify that the foregoing pages, to-wit:

Page One (1): Letter dated September 11, 1963
Travelers Insurance Co. to Harry Harris

Page Two (2): Post Office Registered Receipt dated Sept. 16, 1963
Travelers Insurance Co to Evershield Liquid Products

Page Three (3): Notice of Trial on Damages Filed Nov. 20, 1964 by Plaintiff J. A. Sapp, et al.

are true and correct copies of portions of the Exhibits entered in THE TRANSCRIPT OF APPEAL of the following case:

wherein EVERSHIELD PRODUCTS, INC., is Appellant
and
J. A. SAPP and D. C. SAPP, d/b/a TICE SUPER MARKET are Appellees and Plaintiffs,

in Lee County Case No. L-939, lately pending in said Court, as the same appears of record in this Office.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at Fort Myers, Lee County, Florida, this 13th day of February, 1968,

D. T. Farabee, Clerk Circuit Court
Lee County, Florida
(Signed) FRANK VASILOFF
Frank Vasiloff, Deputy Clerk
(SEAL)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix to Respondent's Brief has been furnished to SAMUEL KIMMEL of the firm of KIMMEL & POKORNY, 406 Jefferson Building, Towson, Maryland 21204, Attorneys for Petitioner, this 19 day of February, 1968.

Julian Clarkson

Of Counsel, Julian Clarkson